TRANSCRIPT OF THE RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 133.

WILLIAM ROEMER, APPELLANT,

vs.

RICHARD C. JENKINSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED OCTOBER 8, 1886.

1 Circuit Court of the United States for the District of New Jersey, Third Circuit.

WILLIAM ROEMER, Complainant and Appellant,
vs.
RICHARD C. JENKINSON, Defendant and Appellee. } In Equity.

By the Honorable John T. Nixon, judge, to Richard C Jenkinson:

Whereas William Roemer has lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of New Jersey, made in favor of you, the said Richard C. Jenkinson, and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do in the matter of said appeal what may remain to justice to be done in the premises.

Given under my hand, at the city of Trenton, in the district of New Jersey, in the third circuit, the 23rd day of August, in the year of our Lord one thousand eight hundred and eighty-six.

JNO. T. NIXON, *Judge.*

2 Endorsed: U. S. circuit c't., dist. of N. J. Wm. Roemer *vs.* R. C. Jenkinson. Citation. Briesen & Steele, appellant's sol'rs, 229 Broadway, New York. Service of a copy of the within citation is hereby admitted. Aug. 25, '86. Betts, Atterbury & Betts, respond. sol'rs.

3 Circuit Court of the United States for the District of New Jersey, Third Circuit.

WILLIAM ROEMER, Complainant and Appellant,
vs.
RICHARD C. JENKINSON, Defendant and Appellee. } In Equity.

To the honorable the Supreme Court of the United States:

The appeal of William Roemer, complainant and appellant above named, respectfully showeth that upon the 16th day of July, 1884, the above-named complainant filed his bill of complaint in the circuit court of the United States for the district of New Jersey, in the third circuit, against the above-named defendant, Richard C. Jenkinson, in a suit in equity, alleging that said defendant had infringed the rights of the complainant therein as secured to him by letters patent granted on the 18th day of September, 1877, to him, and numbered 195,233, and praying for an accounting and payment to the complainant by the said defendant of the profit by him realized

and of the damages suffered by said William Roemer, complainant and appellant, by reason of said infringement of said letters patent and also that the writs of subpœna and of injunction might be issued against said defendant, his clerks, agents, servants, workmen, &c.

4 This complainant and appellant further showeth that pursuant to said prayer a *subpœna ad respondendum* issued out of and under the seal of said circuit court, and was duly served on said Richard C. Jenkinson.

This complainant and appellant further showeth that thereafter said defendant, Richard C. Jenkinson, appeared and answered said bill of complaint by filing his answer, and, among other things, he therein denied the validity of said letters patent, and denied that he infringed the same; that a general replication was filed thereto, and, issue being thus joined, testimony was taken; whereupon such proceedings were had that on the 14th day of August, 1886, a final decree was entered in said circuit court, wherein it was in substance adjudged and decreed that the said bill of complaint be dismissed with costs to the said defendant, Richard C. Jenkinson, previously taxed at $142.31, which said decree is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the decree of said circuit court, together with the bill of complaint, answer, replication, pleadings, depositions, evidence, and exhibits and proceedings in said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew,

5 and that the said decree of the said circuit court and every part thereof may be reversed with costs, and the complainant may be given the relief prayed for in his bill of complaint, or such other decree made as the Supreme Court shall deem just.

BRIESEN & STEELE, *Solicitors.*

A. V. BRIESEN, *Of Counsel.*

Appeal allowed August 23rd, 1886.

JNO. T. NIXON, *J.*

Endorsed: U. S. circuit c't, dist. of N. J. Wm. Roemer *vs.* R. C. Jenkinson. Appeal. Briesen & Steele, appellant's sol'rs, 229 Broadway, New York.

6 At a stated term of the circuit court of the United States held in and for the district of New Jersey, in the city of Trenton, on the 14th day of August, 1886.

Present: Hon. Jno. T. Nixon, judge.

WILLIAM ROEMER
vs.
RICHARD C. JENKINSON. } In Equity.

This cause coming on to be heard at the March term of this court

upon the annexed stipulation and upon the pleadings, proceedings, and proofs, after due proceedings had, it is, upon consideration, ordered, adjudged, and decreed—

That the bill of complaint herein be, and the same hereby is, dismissed, and that the defendant do recover of the complainant $142.31, costs of this suit, and that the defendant have execution therefor.

JNO. T. NIXON, *J.*

Form approved Aug. 11, 1886.
BRIESEN & STEELE.
BETTS, ATTERBURY & BETTS.

7 United States Circuit Court, District of New Jersey.

WILLIAM ROEMER *vs.* RICHARD C. JENKINSON.

It is hereby stipulated and agreed between the solicitors for the complainant and defendant herein that (the issues in the above-entitled case being substantially identical with those in the cases of William Roemer *vs.* Albert O. Headly and William Roemer *vs.* Thomas B. Peddie *et al.*, in the circuit court of the United States for the southern district of New York, in which his honor, Judge Wheeler, on the 4th day of June, 1886, rendered a decision dismissing the bills with costs to the defendants) a decree may be entered herein in the same form as the decrees entered in said two suits on the 8th day of June, 1886.

And it is further stipulated and agreed that in the event that the complainant shall appeal the said suit of William Roemer *v.* Thomas B. Peddie *et al.*, and also the above-entitled suit of William Roemer *v.* Richard C. Jenkinson, on or before the 30th day of October, 1886, then and in that event a transcript of the record in the above-entitled suit need not be filed in the United States Supreme Court, but said suit may be argued on the record of said suit of William Roemer *v.* Thomas B. Peddie *et al.*, and abide by the result of said suit.

New York, July 8, 1886.

8 BRIESEN & STEELE,
Compl't's Sol'c'rs.
BETTS, ATTERBURY & BETTS.

Endorsed: U. S. circuit court, district of New Jersey. William Roemer *vs.* Richard C. Jenkinson. Decree. Betts, Atterbury & Betts, solicitors for def't, 120 Broadway, New York. Filed Aug. 14, 1886. S. D. Oliphant, clerk.

9 UNITED STATES OF AMERICA, } *ss:*
District of New Jersey, }

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, third circuit, do hereby certify that the foregoing are true copies of the original citation, petition of

appeal, decree, and stipulation in the suit of William Roemer against Richard C. Jenkinson as the same remain on file and of record in my office at Trenton, in said district.

The Seal of the U. S. Circuit Court, Dist. of New Jersey.

In testimony whereof I hereto set my hand and affix the seal of said court, at Trenton, in said district, this twenty-seventh day of September, A. D. eighteen hundred and eighty-six.

S. D. OLIPHANT, *Clerk.*

Endorsed on cover: New Jersey C. C. U. S. No. 133. William Roemer, appellant, *vs.* Richard C. Jenkinson. Filed October 8, 1886.

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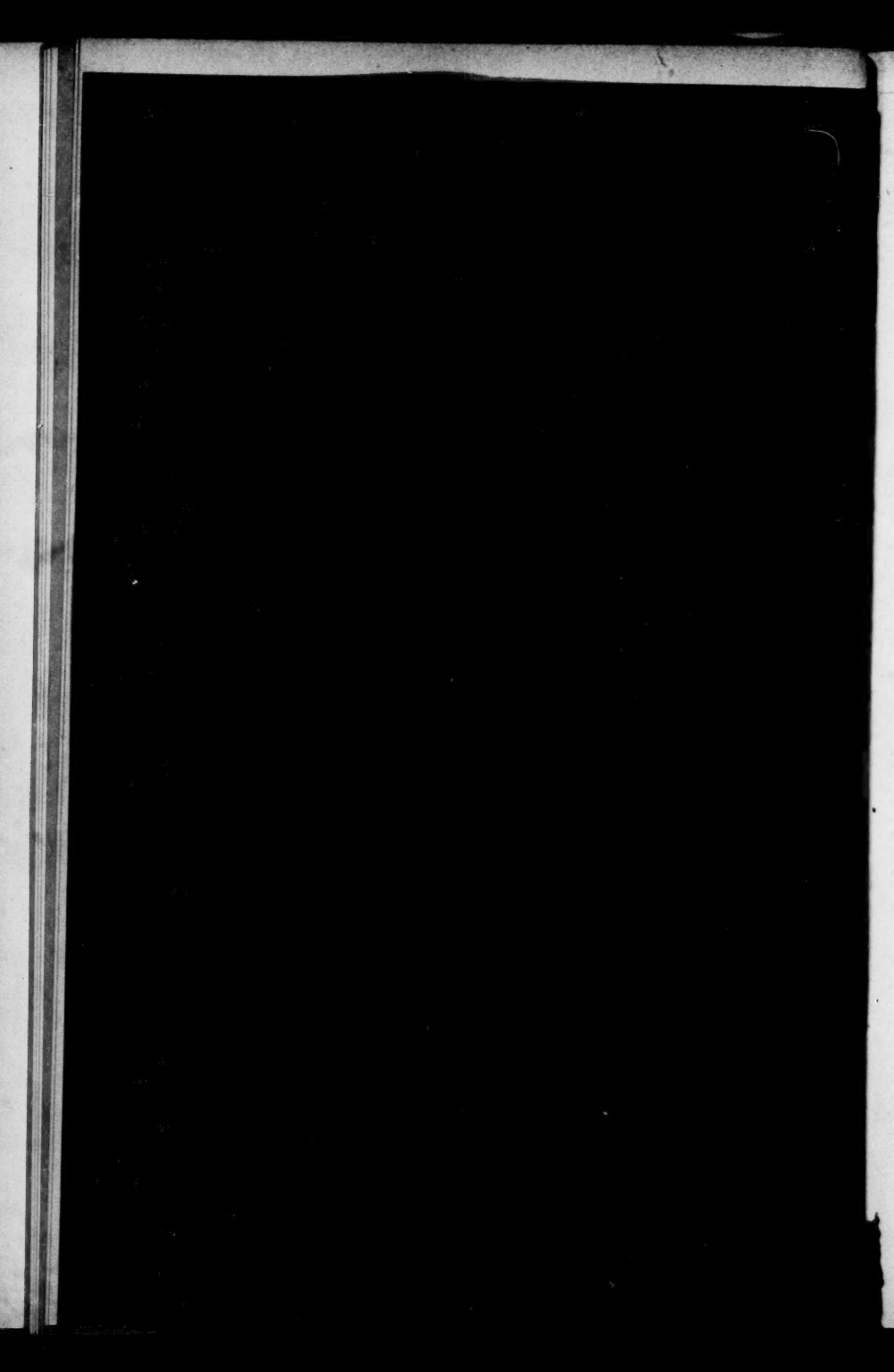

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WILLIAM ROEMER,
Appellant,

AGAINST

THOMAS B. PEDDIE and GEORGE B. JENKINSON,
Appellees.

No. 120.

Please take notice that at the opening of this Court on Monday, October 28th, 1889, or as soon thereafter as counsel can be heard, at the Court Rooms thereof, in the City of Washington, D. C., I shall move this Court for an order directing that the appellant print as part of the record or appeal herein the pleadings and proofs for both sides in the suit entitled William Roemer vs. Edward Simon, in the United States Circuit Court for the Southern District of New York, and which is part of the record herein, and for such other and further relief as to the Court may seem meet.

Dated New York, October 23d, 1889.

J. E. HINDON HYDE,
Of Counsel for the Appellees.

BETTS, ATTERBURY, HYDE & BETTS,
Solicitors for the Appellees.

To A. V. BRIESEN, ESQ.,
Counsel for the Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WILLIAM ROEMER, Appellant, AGAINST THOMAS B. PEDDIE and GEORGE B. JENKINSON, Appellees.	No. 120.

CITY, COUNTY AND SOUTHERN DISTRICT OF NEW YORK, SS.:

CHARLES G. F. WAHLE, JR., being duly sworn, deposes as follows: I am an attorney and counsellor at law, and managing clerk in the office of Betts, Atterbury, Hyde & Betts, the solicitors for Thomas B. Peddie and George B. Jenkinson herein, and am acquainted with the proceedings had herein. This cause is at present on appeal from the Circuit Court of the United States for the Southern District of New York to the Supreme Court of the United States, and is No. 120 on the Calendar for the October Term, 1889, and, as I am informed and believe, is likely to be reached in a very short time.

Upon an inspection of the record, which was received from the Clerk of the Supreme Court of the United States, a few days ago, it was discovered that there was omitted therefrom the copy of the pleadings and proofs of both sides in the suit entitled "William Roemer vs. Edward Simon," in the United States Circuit Court for the Southern District of New York, which was made part of the record herein, pursuant to the stipulation in the second paragraph, folio 21, page 12 of the printed record on appeal herein. At the suggestion of Mr. Hyde, of counsel for the appellees herein, I, this afternoon, called upon Mr. Briesen at his office, and drew his attention to the fact that this matter has been omitted from the printed record, and requested him to instruct the Clerk to print the same or otherwise to have the same printed.

Mr. Briesen declined to accede to my request, and declined to instruct the Clerk to have said record in the cause of William

Roemer vs. Edward Simon, above mentioned, printed for use on the argument on the appeal herein.

CHAS. G. F. WAHLE, JR.

Sworn to before me this 23d day of October, 1889.

HARRY S. GOODRIDGE,
Notary Public,
New York Co.

[SEAL.]

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

No. 120.

WILLIAM ROEMER,
Appellant,

AGAINST

THOMAS B. PEDDIE and GEORGE B. JENKINSON,
Appellees.

CITY, COUNTY AND SOUTHERN DISTRICT OF NEW YORK, ss.:

J. E. HINDON HYDE, being duly sworn, says: I am of mature age, and of counsel for the appellees herein. Upon looking through the printed record sent to me in the above-entitled cause by the Clerk of the Court, and in preparation for argument before the Supreme Court of the United States, I noticed the omission from the printed record of the pleadings and proofs for both sides in the suit entitled "William Roemer vs. Edward Simon" in the United States Circuit Court for the Southern District of New York, and which were introduced herein on behalf of the complainants under stipulation on the record as appears on folio 21, page 12, of said printed record, said portion being as follows: "Complainant's counsel offers in evidence

" * * * Also printed copy of the pleadings and proofs for both " sides in the suit entitled William Roemer vs. Edward Simon, in " the United States Circuit Court for the Southern District of New " York. It is stipulated that the same be considered as though duly " certified, but any objection to the whole or any part thereof on " any ground except want of certification shall be reserved to de- " fendant's counsel; the said record is further subject to correction " by the original record; the said record is in two volumes, and the " same are respectively marked 'Complainant's Record' and 'De- " fendant's Record,' Roemer vs. Simon, S. R. B., United States " Commissioner, January 28th, 1885."

I am acquainted with this case and have had charge of it from the date of the filing of the answer herein in the Court below, and in my opinion it is essential to a proper presentation of this cause before the Supreme Court of the United States, and to insure to the appellees their rights herein, that said records in said cause of Roemer vs. Simon be printed as part of the record on appeal herein, of which they properly form a part.

I argued this cause before the Hon. HOYT H. WHEELER, and a very important branch of the case depended upon said record and proofs, and his Honor Judge WHEELER considered said proofs in deciding this case.

I have requested Mr. Briesen, counsel for the appellant, through Mr. Wahle, as appears by Mr. Wahle's affidavit, verified the 23d day of October, 1889, to have said missing records printed in the record on appeal herein, but I am informed by Mr. Wahle that Mr. Briesen declines to do so.

I append hereto a copy of letter sent by my firm to counsel for appellant.

It has been expressly stipulated between counsel (see Transcript of Record, p. 89, folio 14) that a motion to correct the record may be made.

J. E. HINDON HYDE.

Sworn to before me this 23d day of October, 1889.

CHAS. G. F. WAHLE, JR.,
Notary Public (7),
N. Y. Co.

[SEAL.]

OCT. 22D, 1889.

MESSRS. BRIESEN, STEELE & KNAUTH:

GENTLEMEN: We understand from our Mr. Wahle that you do not intend to print the evidence in the case of Roemer vs. Simon, which forms a part of the Records of Roemer vs. Neumann, Roemer vs. Peddie, Roemer vs. Headly, Roemer vs. Kupper and Roemer vs. Jenkinson, now in the Supreme Court, and shortly to be reached.

We only received the printed transcript within a few days and noticed such omission.

This, of course, should be corrected, and we can hardly believe that you do not intend to print this part of the Record, but, if not, we should be compelled to make a motion to the Supreme Court of the United States for an order that the appellant print this part of the record as he has printed the rest.

Yours very Truly,

BETTS, ATTERBURY, HYDE & BETTS.

You will, of course, have noticed that the stipulation as to the Record is without prejudice to a motion to correct the same.

[ENDORSED:]

Supreme Court of the United States, October Term, 1889, No. 120. William Roemer, appellant, vs. Thomas B. Peddie and George B. Jenkinson, appellees. Notice of motion and affidavits. Betts, Atterbury, Hyde & Betts, solicitors for appellees; J. E. Hindon Hyde, of counsel for appellees.

Service of within is hereby admitted this 23d day of October, 1889.

BRIESEN, STEELE & KNAUTH,

Solicitors for Appellant.

FILED
OCT 28 1889
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 120.

WILLIAM ROEMER,

Appellant,

vs.

THOMAS B. PEDDIE AND GEORGE B. JENKINSON,

Appellees.

STATEMENTS AND AFFIDAVITS IN OPPOSITION TO MOTION TO DIRECT PRINTING OF EXHIBITS.

BRIESEN, STEELE & KNAUTH,
Solicitors for Appellant.

ARTHUR v. BRIESEN,
Of Counsel for Appellant.

Evening Post Job Print, New York.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 120.

WILLIAM ROEMER,
Appellant,
vs.
THOMAS B. PEDDIE and GEORGE B. JENKINSON,
Appellees.

APPELLANT'S STATEMENT IN OPPOSITION TO MOTION.

Object of the motion is to require appellant to present, as part of the Record, the testimony taken in the suit of Roemer *vs.* Simon.

1. Appellees' attorney assumes that the Simon testimony has been "stipulated" into this record. But this is not a fact.

It was only stipulated that the two volumes of testimony—

> "be considered as duly certified, but any objection to "the whole, or any part thereof, on any ground, ex- "cept want of certification, is specially reserved to "defendant's counsel; the said record is further sub- "ject to correction by the original record" (see p. 12, Record, in Case No. 120).

2. Appellee's object (see affidavit Everding) is to show

by the Simon record that a lock termed the "Havell lock" existed before complainant's patent.

But the main issue in the Simon case was as to the prior existence of that lock. That issue was decided in favor of *complainant* and no appeal taken.

Will the Supreme Court review the *Simon* case under cover of an appeal in the Peddie case?

3. Stipulation (page 89, Record in Case 120):

> "The foregoing papers shall constitute the record to "be sent * * * and that the exhibits be retained "by the Clerk of said Circuit Court under the hear- "ing * * * The foregoing stipulation is made "without prejudice to any motion hereafter to be "made to *correct said* record."

This stipulation was entered into in September, 1886. It expresses the understanding of the parties at that time.

To "*correct* said record" can hardly mean that it was in contemplation that some 500 printed pages shall be "added" to said record.

4. The books as offered from the Simon case are evidence only, as Mr. Steele's affidavit shows, in support of the corresponding allegation of the bill, that the validity of complainant's patent had been sustained after the taking of voluminous proofs.

Neither party could, in the face of that offer, use any part of the Simon record as evidence against the other party. This must have been so understood, for the defendant in the Peddie suit offered in evidence an anticipating patent that had already been in the Simon case; but refrained from offering all the patents that had been relied upon by the defense in the Simon case.

Has the defendant on this appeal the right to read patents other than those specifically offered in this suit? And if not, has he the right to assume things to be proven by witnesses in the Simon suit whose evidence in that case the Court discredited?

In the Simon suit the complainant prevailed on the proofs and no appeal was taken. In the present suit the defendant prevailed, and the complainant appealed. It seems a monstrous proposition that the appellee shall have the right to rely on the overruled defendant's testimony in Simon's suit as *evidence*.

5. As an exhibit the volumes in question will be produced at the hearing to show what Mr. Steele intended they would show.

But they do not contain evidence in this suit that should be made part of the record.

Respectfully submitted,

A. v. BRIESEN,
Counsel for Appellant.

NEW YORK, October 26, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WILLIAM ROEMER,
Appellant,

vs.

THOMAS B. PEDDIE and GEORGE B. JENKINSON,
Appellees.

No. 120.

CITY OF NEW YORK,
County and State of New York, } ss.:

ARTHUR v. BRIESEN, being duly sworn, deposes and says:

I am the complainant's counsel in the above entitled

suit and have been his attorney therein ever since its commencement. The suit is brought for alleged infringement of a patent granted to the complainant in the year 1877, said patent being numbered 195,233. Before this present suit was brought the same patent had been brought into Court in the suit of Roemer *vs.* Simon. This Roemer *vs.* Simon suit was brought in the Circuit Court of the United States for the Southern District of New York, being the same Court in which the present suit was originally brought. The suit of Roemer *vs.* Simon was very bitterly contested and a vast amount of testimony taken therein, the printed proofs covering five hundred printed pages. On this large record the case came up for argument before Judge Wheeler and was decided in favor of the complainant.

Soon after this decision had been rendered in the Simon suit, the complainant, by whom the Simon case was regarded as a test case, brought suit against these defendants; and as he wanted to show to the Circuit Court that this patent had upon ample proofs been sustained in the Simon suit, he offered the Simon record in evidence, as appears on page 12 of the record of this suit, and the printed books containing this Simon record were marked by the Commissioner who took the testimony and filed it in the Clerk's office of the Circuit Court, where they now are.

It was never supposed by myself, nor is it reasonable to believe that it could have been supposed, that by offering these records I intended to make the defendants' testimony as given in the Simon case testimony in the present case. I simply wanted to show to the Circuit Court that the contest in the Simon litigation had been severe and *bona fide*. Such I understood at the time, and still believe, could have been the only legitimate object of the presentation of that record as an exhibit.

After the present suit was decided against the complainant an appeal was taken and the transcript made out by the Clerk below in September, 1886. That transcript was submitted to counsel for both parties, and they stipulated,

as appears on page 89 of the record herein: "That the "foregoing paper shall constitute the record to be sent by "the Clerk," &c., and "that the *exhibits* be retained by "the Clerk of said Circuit Court until the hearing "of the appeal in the Supreme Court. The foregoing "stipulation is made without prejudice to any motion "hereafter to be made to correct said record." When that stipulation was entered into I fully believed that the record as sent had the approval of the appellees' counsel as a full record, which could, however, should there be any inaccuracies contained in it, be "corrected" on motion. I never believed at the time this stipulation was signed that the record could be enlarged on motion by incorporating therein some five hundred more pages of printing, which would be of no earthly use to this Court on appeal, or to either party.

If, as the appellees' counsel says, the Court below in determining the present case regarded evidence that had been given by defendant in the Simon suit as evidence in the present suit, because of the offer of those two volumes, such, I believe, would show an error of the Court below, reviewable on appeal.

The matter which the present motion seeks to force my client to print as part of the transcript is, as I have already stated, very voluminous, covering about 500 printed pages, and is already in print as an exhibit; and was offered as an exhibit for the inspection of the Court as such. It will be produced, of course, at the hearing under the stipulation contained on page 89 of the Record. It will be as convenient for the Court to examine this exhibit as an exhibit at the hearing the same as it will examine the model exhibits in the case. It would be a great hardship to require the appellant to print this old Simon record over again, for such printing would cost in the neighborhood of six hundred dollars, and the transcript of it would cost at least four hundred dollars, there being about two thousand folios for which the Clerk below charges twenty cents per folio. Moreover, such a proceeding would necessarily delay the hearing.

Counsel for appellees in his affidavit states that the record was received by him from the Clerk of the Supreme Court "a few days ago." My printed copy of this record has been in my possession for over four weeks last past, and I believe that the appellees' copy was forwarded by the Clerk of this Court at the same time as mine.

I am satisfied that this motion is the result of an afterthought. What the record should be was determined by the attorneys at the time they entered into the stipulation of September, 1886. What it should be was understood throughout these three years during which appellees' counsel had many opportunities during their frequent visits to this Honorable Court of inspecting the record and satisfying themselves as to its condition.

I believe that the object of the motion is simply to make this Court accept as evidence for the defense in this suit, evidence that had been offered for the defense in the Simon suit, but overruled in that suit.

I believe the motion, if granted, would cause great expense, unnecessary delay, would confuse the record, and would fail to add to the case anything that, if the motion be denied, would be before the Court at the hearing.

And further deponent saith not.

ARTHUR V. BRIESEN.

Sworn to before me this 25th day of October, 1889.

HARRY M. TURK,
[SEAL.] Notary Public (93),
N. Y. County.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WILLIAM ROEMER, Appellant, vs. THOMAS B. PEDDIE and GEORGE B. JENKINSON, Appellees.	No. 120.

STATE OF NEW YORK, Southern District of New York, } ss.:

SANFORD H. STEELE, being duly sworn, deposes and says:

I am one of the attorneys for the above-named appellant, and I argued this cause on his behalf at final hearing before his Honor Judge Wheeler. At that argument the record in the previous suit of Roemer against Simon was referred to, but solely for the purpose of proving the allegations contained in folios 9 and 10 of the bill that the validity of the patent involved had been sustained by a decree, and that it was not obtained by default, but after the taking of very voluminous proofs; and, to the best of my recollection, nothing occurred that would indicate that either side considered the evidence in the previous suit evidence in this one. The parties were different and the infringing devices were different, and as it was received in evidence subject to all legal objections it is obvious that no use could be made of it, except for the purpose of showing the fact and the nature of the previous adjudication.

SANFORD H. STEELE.

Subscribed and sworn to before me this 25th day of October, 1889.

HARRY M. TURK,
[SEAL.] Notary Public (93),
N. Y. County.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WILLIAM ROEMER,
Appellant,

vs.

THOMAS B. PEDDIE and GEORGE B. JENKINSON,
Appellees.

No. 120.

STATE OF NEW YORK,
Southern District of New York, } ss.:

HENRY E. EVERDING, being duly sworn, deposes and says: I am a clerk in the office of Mr. A. v. Briesen, of counsel for the appellant herein.

On October the 25th I was told by Mr. Briesen to call on Mr. Hyde, of counsel for the appellees herein, to stipulate as to what portions of the testimony in the suit of Roemer *vs.* Simon he really wanted to use as evidence in this case. Mr. Briesen told me that he would agree to the printing of the Roemer file wrapper and I submitted this to Mr. Hyde, who refused to stipulate to that effect, saying that the Roemer file wrapper was not what he desired to have printed in this case, but that he wished the testimony relating to the Havell lock taken in the suit of Roemer *vs.* Simon to be stipulated and printed in this suit. To this I replied that Mr. Briesen, I thought, would not consent. I informed Mr. Briesen of Mr. Hyde's refusal and request.

On October 26th I again saw Mr. Hyde and asked him what portions of the testimony relating to the Havell lock he desired printed, and he said he wished all the testimony relating to said lock to be printed, or in lieu thereof a written stipulation or consent should be given, acknowledging

the existence, prior to complainant's patent, of the Havell lock referred to in the Simon suit.

HENRY E. EVERDING.

Subscribed and sworn to before me this 26th day of October, 1889.

HARRY M. TURK,
Notary Public (93),
N. Y. County.

[SEAL.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WILLIAM ROEMER,
Appellant,

vs.

THOMAS B. PEDDIE and GEORGE B. JENKINSON,
Appellees.

No. 120.

STATE OF NEW YORK,
Southern District of New York, } ss.:

ARTHUR v. BRIESEN, being duly sworn, deposes and says: I have already made an affidavit upon this motion, and I desire to further depose as follows:

On October 25, 1889, I sent Mr. H. E. Everding, my clerk, to see Mr. Hyde, of counsel for the appellees herein, and to stipulate as to what portions of the testimony taken in the suit of Roemer *v.* Simon he really wished to use as evidence in this suit, and to state that I was willing that the Roemer file-wrapper and contents offered as an exhibit, and printed in the Roemer *v.* Simon case, should be printed and used as evidence herein.

Upon his return Mr. Everding informed me that Mr. Hyde did not desire the Roemer file-wrapper and contents to be so printed and used as evidence herein, but that he wished the evidence in regard to the "Havell" lock which was taken in the Roemer *v.* Simon case to be printed and used as evidence in this cause. In the case of Roemer *v.* Simon the principal contention between complainant and defendant was as to the existence or non-existence of the "Havell" lock prior to the date of Roemer's invention in controversy. Many witnesses were called on behalf of both parties to prove or disprove this point, and many pages of the record in the Roemer *v.* Simon suit were devoted to the testimony in regard to said "Havell" lock. At the final hearing the Court sustained the Roemer patent, virtually sustaining complainant's contention that said "Havell" lock was a doctored-up exhibit.

On October 26, 1889, I again sent Mr. Everding to see Mr. Hyde in regard to what portions of the Havell testimony he wished printed as evidence herein, and on his return, Mr. Everding informed me that Mr. Hyde would accept a written stipulation that said "Havell" lock had been constructed prior to the date of the Roemer patent in lieu of printing said testimony.

In the present suit of Roemer *v.* Peddie and Jenkinson, defendants offered as an exhibit an alleged prior and anticipating patent to Simon, which was also offered by the defendant in the Roemer *v.* Simon case, but other alleged prior and anticipating patents in the said Roemer *v.* Simon case have not been offered as exhibits in this suit.

A. V. BRIESEN.

Subscribed and sworn to before me this 26th day of October, 1889.

HARRY M. TURK,
Notary Public (93),
N. Y. County.

[SEAL.]

FILED
NOV 13 1889

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 120.

WILLIAM ROEMER,

Appellant,

vs.

THOMAS B. PEDDIE AND GEORGE B. JENKINSON.

No. 121.

WILLIAM ROEMER,

Appellant,

vs.

ALBERT O. HEADLEY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 132.

WILLIAM ROEMER,

Appellant,

vs.

CHARLES KUPPER.

No. 133.

WILLIAM ROEMER,

Appellant,

vs.

RICHARD C. JENKINSON.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW JERSEY.

BRIEF IN BEHALF OF THE APPELLANT.

ARTHUR v. BRIESEN,
Of Counsel for Appellant.

Supreme Court of the United States,

OCTOBER TERM, 1889.

WILLIAM ROEMER, Appellant, vs. THOMAS B. PEDDIE and GEORGE B. JENKINSON.	No. 120.

WILLIAM ROEMER, Appellant, vs. ALBERT O. HEADLEY.	No. 121.

Appeals from the Circuit Court of the United States for the Southern District of New York.

WILLIAM ROEMER, Appellant, vs. CHARLES KUPPER.	No. 132.

WILLIAM ROEMER, Appellant, vs. RICHARD C. JENKINSON.	No. 133.

Appeals from the Circuit Court of the United States for the District of New Jersey.

BRIEF ON BEHALF OF THE APPELLANT.

These suits were brought against the above-named appellees for infringement of Letters Patent No. 195,233, granted to the complainant and appellant September 18, 1877, for a combined lock and handle for traveling bags.

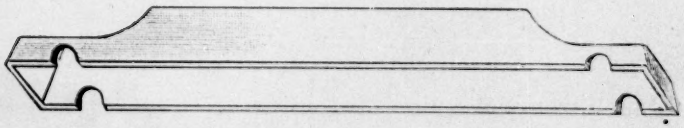
The record is entirely contained in case No. 120. Each of the other three suits contains a stipulation, to the effect, that the same may be argued on the record of suit No. 120, and abide the result of said suit.

The complainant's patent in suit describes a lock-box for traveling bags and the like, which lock box is stamped out of sheet metal, having the form substantially of an inverted letter U, in cross-section; and it states that, in addition to its function as a box for containing the lock mechanism, the extended ends of said box shall also be supports for the rings, to which the ends of the handle, by which the bag is held suspended, are secured.

The claim of the patent is as follows:

"The lock-case made with the notched sides *a a* near its ends to receive and hold the handle rings *B*, substantially as herein shown and described."

The following sketch illustrates the form of the lock-box of complainant's patent:



The Roemer Patented Device.

The invention which constitutes the subject-matter of the patent in suit has met with general approbation. Mr. Roemer testifies (page 23 of the Record) that he has manufactured and used this invention on most of the bags he has sold, and that he has sold them on frames and off the frames to the trade, having made, as he says, over ten thousand dozen altogether, up to the time of giving his testimony in the case. He states that he has sold them to Mr. Jenkinson, to Messrs. Peddie & Co., Headley & Son, Edgar Farmer & Co., to Hammond, to Heller, Koch and others; those sold to Headley & Son being charged to Charles Kupper who put them on to frames and sold the lock and frame to Headley & Son.

Thus it appears that all the defendants in these four suits were dealers in the patented contrivance, and are now infringers thereof.

It also appears that prior to the series of suits now before this Honorable Court Mr. Roemer brought a suit against Edward Simon & Brothers, in the Circuit Court of the United States for the Southern District of New York, the record of which suit is an exhibit in this cause. Voluminous testimony was taken in the Simon suit, and the case finally came up for hearing before his Honor Judge Wheeler, who, in an opinion which is reported in the 20th Federal Reporter, page 197, held as follows:

"UNITED STATES CIRCUIT COURT, SOUTHERN
" DISTRICT OF NEW YORK.

" ROEMER *vs.* SIMON *et al.*

" Decided May 10, 1884.

" WHEELER, *J.*—This suit is brought upon Letters " Patent No. 195,233, dated September 18, 1877, and " granted to the orator for an improvement in combined " lock and handle for traveling bags. The improvement " consists in having the case for the lock long enough to " fasten the handle to at each end by rings through the " upright walls of the case. The handle is thus attached

" to the lock, and by that to the bag, *and the extended* " *perpendicular walls of the case stiffen and strengthen* " *the whole.* If the invention had been of an attachment " of the lock directly to the handles only, or of the exten- " sion of the top plate of the lock case along the frame to " receive the handle-rings, it would have been anticipated; " *but the substance of it is understood to be the single* " *attachment of the lock and handle to the frame, and* " *taking advantage of the walls of the case to strengthen* " *the frame at the handles.* None of the devices " relied upon by the defense meet these qualities. The " patent, therefore, seems to be valid. The structure " shown for an infringement appears to have all the ele- " ments of the patented invention, with the addition of a " bottom plate to the lock, extending beyond and fitting " over the handle-rings. This adds to, but does not take " the place of, the orator's arrangement. The attach- " ment of the handles to the lock-case, and the support " of the whole by the walls of the case, are retained. " This taking of the invention for the purpose of adding " to it is as much an infringement as if taken and used " without the addition. The orator, therefore, seems to " be entitled to a decree. Let a decree be entered for the " orator for an injunction and an account, with costs."

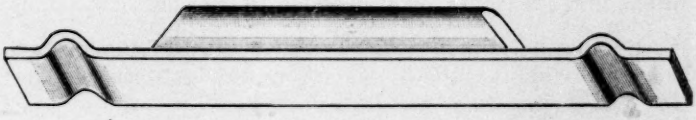
Thus it appears that the utility, and also the validity of the complainant's patent, have been fully established; and that complainant was justified in assuming, at the time he brought these suits, that his patent was in all respects valid, and would receive the most favorable interpretation of a court of equity.

It appears from the history of Mr. Roemer's application for the patent that he was not the first to supply a lock with an extension by which the handle-rings should be secured. The file-wrapper of his application for the patent is before us. It will be found at the end of defendant's record in the Simon case, page 287. It appears that the claim originally presented by Roemer was in words as follows:

"The combination of the lock-case *A*, having the hooks "*b* at its ends, with the rings *B* which are held in place "by said hooks, substantially as herein shown and de-"scribed."

To this claim the Patent Office made objection, stating that it was anticipated by the prior patent of Simon No. 177,020, being the same Simon who was one of the defendants' firm in the suit of Roemer *vs.* Simon.

The Simon patent (p. 86, Record) shows a lock-case, having a bottom plate, which is extended beyond the ends of the lock-case and bulged up, as shown in the following sketch:



The Simon Patented Device.

It is therefore a lock-case provided with an extension which is adapted to hold the handle-rings, but is not a lock-case formed at the ends like an inverted box that has its *vertical* walls notched to receive the handle-rings.

Upon receiving this rejection, the application was amended so that what was meant by the term "hooks" in the original claim should be more clearly defined, and the following claim was presented:

"The lock-case *A* having the notches *aa* at its under "side and combined with the rings *BB* which are held in "said notches, substantially as and for the purpose spec-"ified."

This claim is submitted to the Commissioner of Patents without argument, the applicant trusting that the experienced officer will at once perceive the difference between

the Roemer and the older Simon device; and he reckoned correctly, for the Commissioner now writes him the following letter, under date August 25, 1877:

"The *claim* presented by amendment filed the 24th "instant, is considered to be anticipated by the reference "already cited. *The difference between the two devices* "*appears to be that in applicant's device the notches are* "*cut in the* VERTICAL SIDES *of the lock-case, and in the* "*reference they are struck up from the bottom plate.*"

Upon receipt of this letter, the claim now in the patent of complainant was inserted, and immediately allowed. Together with this last amendment the words "to dispense with an extended bottom plate" were inserted in the preamble, and the following was added to the specification:

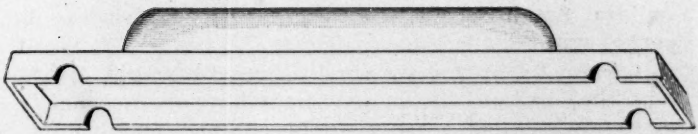
"By making the notches in the sides, the top of the lock-case remains smooth, and offers no obstruction to the free movement of the handle and rings."

It thus appears that the file-wrapper discloses the fact that the production of notches in the vertical walls of the inverted box-shaped lock-case was made the important feature of the invention to be patented; and such was the understanding of the patent by his Honor Judge Wheeler, at the time he wrote the opinion, hereinabave quoted, in the suit of Roemer *vs.* Simon.

INFRINGEMENT.

In the present case the defendant makes a two-story lock-case, having the lock mechanism in its upper chamber, and having no lock mechanism in the lower chamber, the lower chamber being identical in structure with the lock-case of complainant's patent, and having the notches in the vertical side walls precisely as described in complainant's patent, and for the same purpose.

The following sketch represents the structure made by the defendants:



The Infringing Device.

But the argument below was that this lower inverted chamber, inasmuch as it did not contain the lock mechanism, was only an extended bottom plate, and that, as the complainant's patent specifies, that an extended bottom plate may be dispensed with, the defendants had a right, because of that statement in the patent, to use what they do use.

The complainant's contention is that his patent is for an inverted box-shaped structure, open at the lower side, adapted to be a lock case whose ends have the notches in the vertical walls for receiving the handle-rings.

The defendants' contention is that there is no infringement, because the lock mechanism is not contained in this lower box, but is contained, as matter of fact, in an upper box, and that, therefore, we are not presented in that structure *with a lock box* whose ends are extended to form the notches in question.

Assignment of Errors.

We believe the Court below erred in holding that the defendant's structure is not an infringement of the complainant's patent.

Argument.

The defendants' structure has the characteristics and the advantages of complainant's patent. It has, as Mr. Drake very properly shows (page 14 of the Record), *a box-shaped structure having notches cut in the sides near the*

ends for the reception of the handle-rings, thereby enabling the flat lower plate of the Simon patent to be dispensed with.

It seems to us that we are dealing with words, and not with the substance of the invention, if we assume that the mere insertion of a partition in complainant's patented lock box above which the lock mechanism is contained, may suffice to avoid the charge of infringement.

The invention clearly was a long box, capable of containing the lock mechanism, and having at each of its two ends in the vertical side walls the notches that serve as handle-rings. That these notches when applied to the vertical walls are an important improvement, was decided in the Simon suit, in which they were fairly contrasted with the Simon prior invention and with the prior patent of Roemer No. 190,907, page 250, Defendants' Record in Simon suit. In this prior Roemer patent, the top of the lock-case had a cast metal extension for holding the handle-rings.

In the Simon suit there was also said to be an alleged prior structure termed the Havell lock box, which closely resembled the complainant's patented device; but it appeared in that suit that, although the Havell lock box was introduced as an original structure (p. 25, Complt.'s Record Simon suit), actually made in 1866 or thereabouts, it was, in fact, but an exhibit especially prepared by the defendants' partner Schwerin, for the purpose of this suit. Schwerin was forced to admit this during his cross-examination (see answers 78–92, pages 123–126, Defendants' Record in the Simon Case) in which he in important particulars contradicts his former testimony as contained in answers 53 to 58, page 118, Defendants' Record in the Simon suit. This and other testimony to the same effect, which it is needless here to repeat, because the Simon suit is not appealed, discredited *in toto* the allegation, that the Havell box was a genuine older structure than complainant's patent and led to the result already referred to, namely a decree for the complainant.

If no further matter of an anticipating character exists

in the present suit, we do not see how, on the question of infringement, the Court below could have arrived at the conclusion contained in its opinion which is printed on pages 87 and 88 of the Record; for the infringing device in this case shows the notches in the vertical walls of a lock box, the mere fact that the lock box is made in two sections or stories instead of one piece, being wholly immaterial for the purpose of determining the character of complainant's invention. It is quite clear that if the defendants' structure had existed prior to the date of the issue of complainant's patent it would have constituted a complete answer to that patent; and, on the maxim that that which would anticipate, infringes, it is equally clear that the defendants' structure does infringe the patent, if valid.

The notched sides of the defendants' device, combined with the handle-rings, perform all the functions of the same parts in the patented structure. That a patent cannot be defeated by dividing a device into two parts, may be deemed elementary; but one case will be cited for the purpose of using the language of the Court, to wit, Strobridge *vs.* Lindsay *et al.*, 6 Fed. Rep., 510–512.

In that case an injunction had been issued restraining the use of a certain coffee mill as an infringement upon a patent, the patent claiming a mill having a detachable hopper and grinding-shell *formed in a single piece.* After the issue of the injunction the defendant procured a mill to be made having the hopper and grinding-shell made in separate pieces. On motion for attachment for contempt, the Court said: "Manifestly the sole object is to produce a mill "of which it can be affirmed that the hopper and "grinding-shell are not cast integral or formed in "a single piece literally. But 'the letter killeth,' and if "the justice of the case is not to be sacrificed, regard "must be had to the spirit rather than the phraseology of "Strobridge's first claim. Truly, the plaintiff's success "was a barren victory, if by such an alteration as the one "here adopted the injunction of this Court can be evaded. "But the expedient must fail of its purpose. The change

" is but colorable. Although cast in two pieces, yet, when " put together for use the hopper and grinding-shell are " substantially and for all practicable purposes 'formed in " a 'single piece.'"

The Court then refers to Wheeler *vs.* Clipper Mower and Reaper Co., 6 Fisher, 2, as an authority for its ruling.

All we ask in this suit is, that the spirit of complainant's invention be first ascertained, and then applied to a comparison with the defendants' structure. The idea of having an inverted lock box provided at each of its two ends with the notches in its vertical walls, which notches shall constitute bearing edges for the lower part of each handle-ring, is the invention in suit, and is that which has certainly been copied by the defendant.

The advantages of this construction are obvious. They are dwelt upon by his Honor, Judge Wheeler, in his opinion as rendered in the Simon suit. The plate, of which these lock boxes are constructed, is so thin and flexible that if the rings merely bear against the thickness of the plate (as in the Simon patent) the plate must be securely fastened to the frame on each side of the bearing; whereas, if the rings bear against the vertical thickness of the lock, these extra fastenings may be dispensed with, and the danger of bending the metal out of shape is avoided.

New Matter in this Suit.

The only matter in this suit, that was not in the Simon suit, is the reference by the defendant's witnesses Chapman, Jenkinson and Conlan, to the so called dog's-head attachments. These dog's-head attachments are little pieces of sheet metal struck up to represent dog's-heads, and notched at the sides, for the purpose, as the witnesses above named say, of holding handle rings in place; and the witnesses say that these little dog's-head attachments were made, and largely used, in thousands of instances from the year 1870 on to the present time. Whether these little attachments, if actually in existence before complainant's patent would injuriously affect his claim, is a question

hardly necessary to discuss. They are merely handle-holders by themselves; they are merely clasps independently secured each over its own handle-ring; they are not analogous to an inverted long box adapted to hold the whole lock mechanism and having *each* end shaped with notched vertical walls as a receiver of the handle-rings, so that two simple rivets will serve to secure and hold the box of the lock, and the handle-rings, and the handle, and the clasps in place on the frame of the satchel or bag. Hence they cannot be said to be anticipations of complainant's patent, even if older than said patent.

But, as to the geuineness of these dog's-head attachments, we have the following considerations to present:

It is very difficult, and was difficult in the present suit, to show that a certain thing did not exist, when witnesses come to say it did exist. We could only measure the correctness of the evidence by the inherent probabilities or improbalities. Chapman produces these dog's-head attachments and says they are like those he had known in 1870 and since. He produces certain bills for these dog's-head attachments (p. 83, Record), one dated August 26, 1870, one September 6, 1875, and one November 3, 1876. But these bills are not receipted, nor does it appear who wrote them, nor has Chapman held them in his possession or previously seen them. He says these bills were handed to him by a clerk in the employ of the defendant Peddie, just before testifying. If these dog's-head attachments had been made, as the witness Chapman claims, so long ago, why is not an *original* exhibit, *an actual structure really made before* 1877 *produced* and proven to have been made at such earlier date? Peddie & Company, the defendants in this case, in whose employ Chapman is, were interested with the defendants in the *Simon* case; as Mr. Roemer testifies in answer 21, page 31 Record, they assisted the defendant in the Simon suit. Their dealings with Stevens, Roberts and Havell, were fully entered into during Mr. Havell's examination in the Simon suit (p. 35, Defendant's Record, Simon suit).

Havell's books were then examined into. Havell himself was asked this question (p. 36, Defendant's Record, Simon suit):

x-Q. 202. In Exhibit Havell Lock Box, the top was *raised* to form the loop for the handle-ring. *I wish to know whether you ever notched the sides to form the loop for the handle-ring?*

A. No; we *never* notched the sides.

Jenkinson, who now also testifies about these dog's-head attachments, and who is one of the defendants in this suit, was a witness as to his prior knowledge, in the Simon case. Why didn't he there speak of these dog's-head attachments? His testimony will be found on pages 217–238 inclusive, of Defendants' Record in the Simon case. Again, while he testifies for the defendant in the present suit, he refreshes his memory by a bill (see answer 32, page 71), and is asked to produce that bill, but answers, "I will not." It is thus shown that evidence which might have been brought to corroborate his testimony, and on which the complainant might have based proper inquiries, was deliberately withheld by this interested witness.

Conlan, the third witness who testifies about these dog's-head attachments in the present suit, was also a witness for the defendant in the Simon suit (see pages 149 to 163 Defendants' Record in the Simon suit), and was in the employ of Havell, the party most interested against the complainant in the Simon suit. Why did not Jenkinson, Havell and Conlan prove their knowledge as to these dog's-heads in the Simon suit? Why did not Peddie, who helped defend the Simon suit, produce Mr. Chapman's evidence there? The answer is simple. Mr. Roemer testifies that the Exhibit Dog's-head Attachments have notches in them which are not formed by dies, but are put in by hand, and that these notches have the appearance of having been recently produced, *the notches not being alike on both sides of the dog's-*

head, which would not be the case had they been made in dies (see p. 31, Record). In other words, it is clear that the dog's-head attachments were filed and supplied with the notches for the purpose of being made exhibits in this suit. They are not genuine structures that existed before complainant's patent, and for that reason cannot possibly have any effect injurious to the rights of the complainant in the premises.

We therefore respectfully submit, that the decree of the Court below dismissing the bill of complaint was erroneous; that the complainant's patent, standing as a valid patent, deserves a construction which embraces the defendants' structure; and that, therefore, the decree below should be reversed.

Respectfully submitted,

ARTHUR V. BRIESEN,
Attorney for Appellant.

NEW YORK, November 10, 1889.

Office Supreme Court U. S.
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JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 120 and Three other Cases.

ROEMER *vs.* PEDDIE ET AL.

Reply to Brief of Appellees.

We find, upon inspecting the brief filed on behalf of the appellees, that considerable stress is laid therein upon the so-called *Fisher bag*, it being asserted that this Fisher bag shows an anticipating structure closely resembling complainant's invention—so closely, in fact, that no patentable invention remains.

The Fisher bag was an exhibit in the Simon suit, but not in this suit, and whatever testimony bears upon it will be found in said Simon suit. Judge Wheeler, in deciding the Simon suit in favor of complainant, overruled the views of defendants respecting this Fisher bag. The reasons which led him to do so were probably based upon the following considerations:

The evidence in the Simon case seeks to show that the Fisher bag was imported into this country by one Bernheim in March, 1877 (answer 7, page 265, Defendant's Record in the Simon suit). This was nearly a year and a half after Mr. Roemer had made his invention. (See pp. 23 and 24, Complainant's Record in the Simon suit.)

Bernheim is a witness also in the present suit, but has nothing to say *here* about said Fisher bag. After this bag was in Bernheim's possession, Mr. Roemer sued him and his firm for infringement of the patent here in suit, and obtained an injunction (pp. 266 and 267, Defendant's Record in Simon suit). That the Fisher bag resembles the complainant's patented invention was testified to in the Simon suit by no less a person than Mr. Hyde, *defendant's counsel.* His testimony, considering the fact that he was the paid counsel of defendant at the time he gave it, could only have had the same weight, it seems to us, that an assertion of *counsel* may have. In other words, it was hardly testimony, but is the opinion of interested counsel. But whatever Mr. Hyde may have thought as to the construction of the Fisher bag, it can have no bearing in this suit, because the said defense was overruled in the Simon suit, and because afterwards the Fisher bag was not reintroduced here as an exhibit.

Two design registers of Fisher obtained by him in England in 1875 were also offered in evidence in the Simon suit, but not in this suit. Neither is accompanied by a description. We submit that a mere drawing filed in the archives of a foreign copyright office, as these drawings were, cannot anticipate an American patent.

Reeves *vs.* Keystone Bridge Co., 5 Fisher, 456.
Judson *vs.* Cope, 1 Fisher, 618.
Seymour *vs.* Osmonde, 11 Wall., 555.
Curtis on Patents, § 378*a*.
Parsons *vs.* Coldgate, 15 Federal Rep., 600.
Collender *vs.* Griffith, 2 Fed. Rep., 206.

Here it was held that a design patent of the United States will not anticipate a subsequent mechanical patent for a construction having the same form. How much less can English registration of design be regarded as a prior publication; but whether or not these registers would be proper

evidence in the suit is an immaterial question, so far as the present suit is concerned, because these registers do not show Mr. Roemer's invention. They show bars with rings swiveled therein. Evidently the bars were perforated to receive the lower swivel pins of the rings. There are in these registrations no notched side walls and no U-shaped cross-sections analogous to that shown by complainant in his patent.

Moreover, it seems to us that though counsel may have a right to refer to the two volumes of the Simon Record in this argument, because said volumes were offered in evidence, defendant is not in position to assume that anything is proven against the validity of complainant's patent in the Simon case in the face of the fact that the Simon case was decided in favor of the complainant and no appeal taken.

Nor has defendant, as we respectfully submit, any right to comment on the *Fisher bag*, *the Havell lock box*, or any other exhibit not offered in evidence in this suit. The introduction of the printed volumes does not carry into evidence in this suit the machines that were referred to in the said volumes.

Defendants, in order to apprise complainant of their desire to exhibit these machines, should have offered them in evidence.

Their production here before the Supreme Court is a surprise to appellant and does not appear warranted by the record.

Respectfully submitted.

ARTHUR v. BRIESEN,
For Appellant.

WASHINGTON, *November* 15, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

WILLIAM ROEMER, Appellant, vs. THOMAS B. PEDDIE ET AL., Appellees.	No. 120.

BRIEF FOR APPELLEES.

Statement.

This suit was brought by bill in equity, filed July 16th, 1884, charging infringement of a patent granted to William Roemer, for alleged improvement in Combined Lock and Handle for Traveling Bags, dated September 18th, 1877, No. 195,233 (R., pp. 1–5).

The defendants answered, denying infringement, denying the novelty of the invention and citing a large number of prior patents, publications and anticipating witnesses.

The answer further stated that the alleged improvement did not require the exercise of invention for its construction.

It further alleged that the prior suit, to which reference was made in said bill, brought in the District of New Jersey, against David Neumann and Carl Neu-

mann, was not defended, and that the decree therein was entered upon default.

It also alleged that as to the allegation of the bill respecting a suit by the complainant against Edward Simon *et al.*, the respondents were not aware of any of the matters therein, except that there was such suit and that it was decided in favor of complainant on some ground unknown to these respondents, and that these respondents were not a party to said suit, and were not in any way bound by the decision therein (R., pp. 6–9).

Replication was filed November 6th, 1884.

A motion for preliminary injunction was made by the complainant and was denied by his Honor Judge WHEELER in a decision, which is found on page 20 of the Record.

Proofs were taken by both parties and the cause came on for final hearing before his Honor Judge WHEELER, and an opinion was rendered on June 3d, 1886, by Judge WHEELER dismissing the bill (R., pp. 87–88).

A decree dismissing the bill was entered on June 8th, 1886 (R., pp. 88–89).

An appeal was taken to this Court from said decree August 24th, 1886 (R., p. 89).

The Proofs.

The proofs in the case are in part found in the testimony taken expressly for use in this case, and in part in the record of the prior suit of *Roemer vs. Simon*, which the complainant himself offered generally in evidence (Rec., p. 12) and which, being offered by the complainant, whether *one* or for every purpose, is open to use for any purpose by the defendants (*Campbell vs. James*, 17 Blatch., 45 and cases there cited, and *Western Union Co., vs. Balt. & Ohio Co.*, 26 F. R., p. 55).

When references in the course of this brief are made to the record in *Romer vs. Simon*, it will be so stated.

POINTS ON BEHALF OF APPELLEES.

First Point.

THE ROEMER PATENT IS INVALID.

(*a*) *The Construction of the Patent.*

The patentee has described what he supposes to be his invention in the following words:

"This invention relates to a new construction of lock-case for traveling bags, satchels and the like, whereby the *same is made to retain the rings which connect with the handle*, TO DISPENSE WITH AN EXTENDED BOTTOM-PLATE, and yet to leave said rings movable in their bearings.

"The invention consists in forming notches in the sides near the ends of the lock-case, *which notches engage over* the lower parts of the handle-rings."

* * * * * *

"The ends of the lock-case are, by notches *a*, which are cut into or formed into its sides, made hook-shaped, as clearly shown in Fig. 2, and these hooks *b*, thus produced, *serve to retain the handle-rings B B in place*."

The claim is:

"The lock-case with the notched sides *a a*, near its ends to *receive and hold the handle-rings B*, substantially as herein shown and described."

The words to which particular attention is called have been italicised or placed in capitals in the quotation.

The alleged invention relates to the *lock-case* of traveling bags, or to that part of the case or box *which*

holds the locking mechanism, and consists in the extension of the metal of *such* case on each side for stated objects.

The objects are three in number:

1. To construct the *lock-case* so that *it*, the lock case itself, is made to retain the rings which connect with the handle.

2. To *dispense* with an extended bottom plate.

3. To leave the handle-rings movable in their bearings.

These objects are attained by making the metal which forms the ends of the lock-case hooked-shaped, so as to engage with and hold the handle-rings.

(*b*) *The previous state of the art.*

It must certainly be within the knowledge of this Court that it has been the practice, in the manufacture of traveling bags, satchels, and similar articles, time out of mind, to place the lock upon the bag-frame and to fasten the handle to the bag-frame by separate pieces of metal made in the form of loops or rings fastened over rings terminating the leather handle, and riveting these ring-loops to the bag-frame.

Such a use of ring-loops is admitted by the patentee Roemer, himself, to have been known to him as early as 1852 (Roemer vs. Simon, p. 30, q. 17).

This method of construction was early seen to be incommodious, because it involved making the lock and handle fastenings in three separate pieces, involving a separate fastening for each, to fix them to the bag-frame, thereby consuming time and material.

Inventors, therefore, in this line of articles conceived the idea of making these three pieces, namely, the lock and two handle fastenings in a single piece, which could be fastened to the bag-frame as a unit, thus affording a convenient means of selling these bag trimmings, as they are called, in one piece, and also

saving labor in affixing them to the bag; and, as appears from the evidence in this case, inventors proceeded upon two distinct lines of invention in achieving this result.

Some of them proceeded upon the principle of combining the lock and handle fastenings *with a single extended under or bottom piece or plate.* This was done by the manufacturer of the bag trimmings, and this united structure was furnished as a single article to the bag makers, who attached it as a single attachment to the bag frames.

Such a form of structure is exhibited in this case by the patent to William Simon, May 2, 1876, being Defendants' Exhibit No. 2 (Roemer vs. Simon, D., p. 242), and in the reissue of that patent, Defendants' Exhibit No. 3 (Roemer vs. Simon, D., p. 247).

Other inventors conceived the idea of making the metal of the *lock-case* serve the double purpose of containing the lock and *attaching the handle to the bag frame*, by forming the lock-case with extended ends, which embraced the handle rings when attached to the bag frame, thereby dispensing with the extended *plate* which the other class of inventors employed.

Such a structure as this is exemplified in Defendants' Exhibit Fisher Bag, and in the structure patented by William Roemer, appellant, on May 15th, 1877, No. 190,907 (Defts.' Exhibit No. 4, Roemer vs. Simon, p. 249), and also in Defts.' Exhibit Havell Lock Box, (Roemer vs. Simon, p. 10, Q. 11).

The prior art on which we rely is therefore to be found in

(1) The Simon patent of 1876.
(2) The Roemer patent of May 15, 1887.
(3) The Havell Bock Box.
(4) The Fisher Bag.

The two patents of course prove themselves, and as one of them (the Simon patent) was disclaimed in obtaining the patent in suit, and the other (the Roemer pat-

ent) is a prior patent of the same inventor, there can be no question as to the fact of their priority.*

The evidence as to the prior existence of the Havell Lock Box and the Fisher Bag we discuss in an *Appendix* to this brief, in the form in which the subject was treated in the brief in *Roemer vs. Simon*, in the Court below. We do not insert the discussion of the evidence as to the Havell lock box in the main part of this brief, because Judge WHEELER, in Roemer vs. Simon, 20 F. R., 197, held, as we understand, that the facts were proved; though he differed from us as to their bearing.

It is not necessary to contend that each of these two different methods of accomplishing this result did not originally form a patentable invention, but we do contend that, in view of these devices which preceded the particular device of Roemer described and claimed in his patent in suit, there was no invention in making the present form of device.

The Court will perceive that the structure described and claimed in the Roemer patent in suit belongs to the second class of the devices above described, in which the *lock-case* serves the double purpose of containing the lock and securing the handle to the bag.

We think that the Court will have no difficulty in deciding that the prior existence of Defendant's Exhibit Havell Lock Box, has been fully proved by the evidence in this case, and that there can be no successful

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* The attempt to prove Roemer's present invention to have been made in the fall of 1875 (*Roemer vs. Simon*, C., p. 16, x-Qs. 28-29, and C., p. 23, Qs. 1-3, and C., p. 147, fol. 439) was wholly unsuccessful, and was not accepted by the Court, in view of the fact that when rejected on the Simon patent of 1876 in applying for the patent in suit, he made no claim to anticipate, but amended to avoid it; and also in view of the fact that he himself took out his prior patent of May 17, 1877.

contention opposed to the fact that the Fisher bag lock was in public use in this country prior to the date of Mr. Roemer's invention; so also, of course, there can be no pretense but that the prior patent of May 15th, 1877, granted to William Roemer, is to be considered as limiting the patent in suit.

Any one of these anticipations is sufficient for the purpose of showing that it was not new, at the date of the Roemer patent, to fasten the handle of a bag to a bag frame by the lock-case itself.

So obvious was this, that his Honor Judge WHEELER, in deciding the prior case of Roemer vs. Neumann, 20 Federal Reporter, 197, stated as follows, speaking of Roemer's Patent, No. 195,233, on which this suit is brought:

"If the invention had been of an attachment of the "lock directly to the handles only, or for the extension "of the top-plate of the lock-case along the frame "to receive the handle-rings, it would have been an- "ticipated."

It, therefore, becomes a question now whether the Roemer Lock Box, described in the patent in suit, shows anything that was patentable in view of these prior structures—for instance, *either* the structure described in his own prior patent of May 15th, 1877, *or* the Havel Lock Box, or the Fisher Bag Lock.

Upon this point Mr. Roemer's own testimony is significant (*Roemer vs. Simon*, C., p. 11):

"5 x-Q. What do you consider to be the essential "chacteristics of the notches which engage over the "handle-rings, which causes the defendants' device to "embody what you consider to be the invention "claimed in your patent No. 195,233?

"A. That the lock *holds the handle* to the frames.

"6 x-Q. Is that the only feature which you consider "essential?

"Yes, sir; it is the main feature.

" 7 x-Q. It is the *only* feature which you consider " essential ?

" A. It is.

" 8 x-Q. Why do you consider it important for the " lock to hold the handle to the frame ?

" A. Combining the lock and handle enables me to " rivet the lock to the frame at the same time that I " fasten the handle to the frame ; thus I save labor.

" 9 x-Q. Is the saving of labor by reason of the fact " that you are enabled to rivet the lock to the frame at " the same time that you fasten the handle to the frame " the only advantage or utility of your invention de- " scribed in patent 195,233 ?

" A. No ; it is not the only advantage, as in con- " structing the lock to a suitable distance for the handle- " rings it strengthens the frame of the bag.

" 10 x-Q. Have you now stated in your last answer " *all* the advantages or utility of your said invention ?

" A. Yes, sir.

" 11 x-Q. Why is it an advantage to rivet the lock to " the frame at the same time you fasten the handle to " the frame ?

" A. There is no need for any extra handle attach- " ments.

" 12 x-Q. Is that the *only* advantage ?

" A. *Yes*, sir.

" 13 x-Q. Provided you are enabled to rivet the lock " to the frame at the same time that you fasten the " handle to the frame, and thus strengthen the frame of " the bag and save any extra handle attachments, does " it make any difference what the particular form or " construction of the lock, or lock-case, is ?

" Counsel for complainant asks whether the " question refers to the comparison of the two " exhibits or to the patent alone, or to the de- " fendants' device alone.

" Counsel for defendants state that the ques- " tion intended to refer to the invention claimed

" in Patent No. 195,233, and to remove any doubt
" he puts the question in the following form :

" 14 Q. Provided you are enabled to rivet the lock
" to the frame at the same time that you fasten the
" handle to the frame, and thus, as you say, strengthen
" the frame of the bag and save any extra handle at-
" tachments, is it material, so far as any advantage or
" utility of your invention claimed in patent 195,233 is
" concerned, what the construction or form of the lock
" or lock-case is ?

" A. *It is not material ;* as long as the lock engages
" over the handle-rings, I claim that the article would
" be *identical* with my patent.

" 15 Q. Do you mean by the phrase, 'the lock en-
" 'gages on the handle-rings,' that some portion of the
" metal which carries or encloses the lock mechanism
" should be extended at the ends far enough to make
" notches or receptacles for the handle-rings ?

" A. I mean nothing else but the lock or lock-case
" itself, which I stated before, holds the handle for the
" frame."

Now, this evidence as to the advantages and *all* the advantages of the structure patented by Roemer in his suit is *just as applicable to the contrivance of his prior patent*, as it is to this. Whatever merit there is in his present structure that is a merit, is merely that which is common to it and its prior structure. No support can therefore be given to his patent of September, 1877 (that in suit), by reason of advantages which are not found in his prior patent of May, 1877.

If his claims as an inventor of a structure embodying those advantages are to be supported at all, they must be supported on his first patent, and not on his second.

So also all of these advantages are *only* those which were also possessed by the Havell lock box and by the Fisher bag lock.

His counsel appreciated the force of this position, and seeing the fatal effect of Roemer's evidence, above cited, sought to prove by him, by somewhat leading questions, that there was an advantage in his second lock-box *over* his first (which he had *overlooked (?)* on his direct examination) by reason of the fact that the form of case having notches to hold the handle-rings could be *struck up*, whereas the first form, with bars for the handles, would have to be cast.

(The italics are ours.)

Roemer vs. Simon, p. 14, Q. 20.

The Court will also see, however, that it was not the invention of Roemer to make a lock-case which could be struck up in a die, instead of being cast, *for such a form of lock-case is shown in the prior Havell lock-box.*

Under these circumstances, it is clear that there is no invention in what Mr. Roemer has shown in his patent in suit, in view of what he himself had shown in his prior patent, and in consideration of other prior structures of this class.

Winans vs. Denmead, 15 How., 330.
Evans vs. Eaton, 3 Wheaton, 454.
Smith vs. Nichols, 2 O. G., 649.
Tucker vs. Spaulding, 13 Wall., 453.
Phillips vs. Page, 24 How., 164.
Hicks vs. Kelsey, 18 Wall., 670.
Rubber Coater Harness Trimming Co. vs. Welling, 97 U. S., 7.
Terhune vs. Phillips, 99 U. S., 592.
Crouch us. Roemer, 103 U. S., 797.
Atlantic Works vs. Brady, 107 U. S., 192.
Yale Lock Co. vs. Greenleaf, 117 U. S., 554.

But even the particular way of forming notches or aperatures to hold the handle rings, by forming them in the side walls of a struck up piece of metal, as shown in the lock-box of the Roemer patent in suit, was not Roemer's invention.

Such a precise form of notch for rings is shown in Defendant's Exhibit Dog's Head Attachment, introduced in this case.

The manufacture, use and sale of these articles since 1870 are proved by the defendants' witnesses, Chapman (R., p. 61), Jenkinson (R., p. 68), Conlan (R., p. 72).

The complainant Roemer sought to contradict this evidence by stating that no frames wide enough for such handle attachments were made prior to 1880 (R., p. 29, Qs. 5–7).

In rebutting this testimony given by Mr. Roemer the defendants proved not only that such wide frames were made, but that they were made *for Mr. Roemer himself* as early as 1871, as well as for others (Bernheim, R., p. 74), and that Mr. Roemer had *thousands of dozens* of them! They were made under a patent issued to Mr. Roemer himself in January, 1871 (Defts.' Ex. Roemer Patent of January 3, 1871), and one of the original frames itself is produced (Defts.' Ex. Roemer Frame of January 3, 1871).

So overwhelming is this proof of the falsity of Mr. Roemer's testimony, that his counsel, under instructions from him, admits that it was untrue, and that Mr. Roemer *knew* that it was untrue (R., p. 82).

Will any weight whatever be given to any testimony of Mr. Roemer after this episode?

From these facts, then, it appears that the last vestige of invention has been removed from Mr. Roemer's lock. Not even the *form of notch for holding the rings* is original with him.

He has simply taken the Havell lock-box or his own lock-box of his patent May, 1877, and substituted for the forms of notch or ring-loop in those structures the old and well-known form of ring-loop shown in the Defendants' Exhibit Dog's Head Attachment. This

does not amount to invention (Brevoort, R., p. 52, Q. 7; p. 53, Q. 8.

Stimpson vs. Woodman, 10 Wall. 117.
Tucker vs. Spaulding, 13 Wall., 453.
Dunbar vs. Myers, 94 U. S., 187.
Hall vs. McNeale, 107 U. S., 99.
Slauson vs. R. R. Co., 109 U. S., 117.
Bossby vs. Ecclesin Mfg. Co., 110 U. S., 131.
Stephenson vs. Brooklyn Co., 31 O. G., 263.

Could any one take this old form and substitute it for the ring-loops of the Havell lock-box and have a patent for the result? We think not; and yet this is all that Mr. Roemer has done. The law does not admit this to be invention.

Second Point.

THE DEFENDANTS DO NOT INFRINGE.

But when we come to the question of defendants' structure, which is claimed by the complainant to be an infringement in this case, *we find that it does not even belong to the class of bag locks* to which the device described and shown in the Roemer patent in suit belongs.

On the contrary, it belongs to the first class of bag-attachments, of which we have spoken above in our Brief, that is to say, the class in which the locks and handle-fastenings are combined with the *extended bottom plate*, and the class illustrated by the Simon patent of May 2d, 1876 (R., p. 86).

Upon examination of the file wrapper and contents of the Roemer patent in suit, which has been put in evidence in the case of Roemer vs. Simon (Roemer vs. Simon, R., p. 291), the Court will see that this Simon patent was cited by the Patent Office as an

anticipation when Mr. Roemer first presented the application for his patent, and that, in consequence of such reference, Mr. Roemer deliberately stated, by amendments which have been incorporated into the specification of the patent as it issued, that the object of his invention was *to dispense with an extended bottom plate*, and thereby distinctly differentiated his invention from the class of bag-locks which used an extended bottom-plate.

This question of infringement was before the Circuit Court on a motion for preliminary injunction made in this case by the complainant, and that Court then decided that the defendant's structure did not infringe the complainant's patent.

The motions were argued on the 14th and 15th of November, 1884, and on the 18th of November the Court rendered its decision in the following words:

"The patent of the orator, No. 195,233, is for a lock-
"case for traveling bags, with notches in its perpendic-
"ular sides for the handle-rings (Roemer vs. Simon, 20
"Fed. Rep., 197). The lock-cases alleged to infringe
"do not have notches in these sides for the handle-
"rings. The notches are in the sides of an extended
"struck-up bottom plate, *which the patent does not*
"*cover, but excludes.*"

The complainant examined two witnesses to prove infringement after this decision was rendered.

The first of them, Mr. Drake, was the expert who made the affidavit for the complainant on his motion for injunction.

It is unnecessary to review his testimony in detail, as the following questions and answers which he gave on cross-examination are an admission which clearly shows that the defendants' locks belong *not* to the class of locks which "*dispense with an extended bottom plate* like that of the patent in suit, but to the *older type* of the Simon patent which use an extended bottom plate.

Drake said as follows:

"30 x-Q. Then, if the form of ring-loop, shown in "the Roemer patent in suit, was made in the extended "bottom plate of the Simon patent No. 177,020, that "would not be the structure described and claimed in "the Roemer patent in suit, would it?

Objected to as not cross-examination.

"A. The ring-loop shown in the Roemer patent "could not be put in the bottom plate shown in the "Simon patent. But if the bottom plate in the "Simon patent were struck up in the form shown in "the 'Exhibit Jenkinson Lock,' and the notches cut "in the side in the same way, it would be, in my judg-"ment, substantially the same structure that is de-"scribed in the Roemer patent in suit.

"31 x-Q. And is that what you think has been done "in the case of 'Complainant's Exhibit Jenkinson "Lock'?

"A. *Yes, sir; that is the way I view it.*

"32 x-Q. And that is why you think the 'Com-"plainant's Exhibit Jenkinson Lock' is an infringe-"ment of the Roemer patent in suit, is it not?

"A. *Yes, sir*" (R., pp. 19-20).

The proofs of infringement were confined to the "Jenkinson Lock" because the complainant's expert testified that all four locks of the different defendants are alike in construction (R., p. 5, Q. 7).*

This, of course, is a distinct admission by the expert for the appellant that the alleged infringing device has been made by striking up such a *bottom plate* as is

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* As the Court will see by the record, the words "Neumann Lock" in x-Q. 9 should read "Jenkinson Lock," the latter being the lock about which Mr. Drake had been testifying, there being no "Neumann Lock" in the case.

shown in the Simon patent, and forming the ring-loop in such *bottom plate.*

The defendants' expert, Mr. Brevoort, correctly states that because the notches are put in an extended bottom plate, which the Roemer patent expressly dispenses with, the defendants's locks do not infringe that patent (R., p. 53, Qs. 11, 12).

The complainants also called a Mr. Theberath to testify upon the question of infringement, but his answers to very leading questions (R., p. 24 25, Qs. 5, 8) are valueless, as he says that locks for traveling bags are entirely out of his line of business (Q. 4), and that he is not an expert in locks (p. 39, Q. 9).

The complainants also produced certain models to illustrate the construction which they contend should be placed, respectively, on the Roemer patent and the Simon patent (R., p. 14), and examined their expert in regard to them.

Their first contention is that the Simon patent contemplates *two* plates, a short one and a long one. The Court will readily see this error from the patent itself, and the complainant's expert, Mr. Drake, himself furnishes the proof of such error (R., p. 15, Qs. 10, 20), which is also exposed by the defendant's expert, Mr. Brevoort (R., p. 55, Q. 18).

The complainant's second contention is that the Roemer lock-box may be made in two sections, an upper and lower, and that such a construction is the one which is exhibited in the defendant's locks.

The Court will at once perceive, on a mere inspection, the difference between the defendant's locks and the complainant's illustrative model (Complainant's Model No. 2), and the distinction is clearly pointed out by the defendant's expert, Mr. Brevoort (R., p. 56, Q. 20).

In the effort to prove infringement, complainant's counsel have tried to show that the bottom plates of

the defendant's locks are a part of the box because they support the lock-box and close it on the bottom (R., p. 26, Qs. 22, 23). The Court will at once see that if that were the case, then Simon had previously shown ring-loops formed in the lock-box of a bag in his patent of May, 1876, because Simon's button plate also closes the lock-box on the bottom.

The complainant's position is, of course, not tenable, because it logically necessitates calling the frame of the bag itself a part of the lock-box, when, as in the Roemer patent, the box is placed, without an intermediate plate, directly upon the frame (R., p. 24, Qs. 5–7).

Upon this testimony, the Circuit Court, when the the case came on for final hearing, again rendered an opinion that defendant's structure did not infringe the complainant's patent, and upon that opinion a decree dismissing the bill was entered (Rec., p. 87).

Upon both grounds, therefore, that the patent is invalid for want of novelty and invention, and that the alleged infringing structure is not, in fact, an infringement, we submit that the decree entered by the Court below should be affirmed.

Third Point.

Upon all points of the case the right is with the appellees, and the appeal should be dismissed with costs.

Respectfully submitted,

FREDERIC H. BETTS,
J. E. HINDON HYDE,
Of Counsel for the Appellees.

November 8th, 1889.

APPENDIX.

The Havell Lock-Box.

The defendants introduced in evidence a lock-box like one which was constructed and sold in considerable numbers in 1866 and 1867, by Mr. George Havell, (Defendants' Exh. Havell Lock-Box).

This lock-box was made with ring-loops for the reception of the handle rings; the ring-loops were formed in the metal of the lock-box itself; they were struck up, or made by notching out the extension of the lock-box (Defts.' R., Du Faur, p. 172, Q. 20); * they allowed a free movement to the handle rings; and they consisted in hook-shaped ends given to the lock-box (see Defts.' Exh. Havell Lock-Box).

The complainant, fully persuaded that the novelty of his device claimed in the patent in suit is successfully attacked by this exhibit, has devoted the whole of his rebutting testimony to prove that this lock-box never existed. We submit that its existence, and in the form claimed for it by the defendants, is fully proved by the whole evidence in the case.

The history of the manufacture and sale of this Lock-Box by Mr. George Havell in Newark, N. J., in 1866 and 1867, is fully and in detail set forth by George

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* The references throughout this Appendix are to the printed record and Exhibits in the case of *Roemer vs. Simon*. The Record of that case, as printed in the Circuit Court, is, as we understand, to be used in this Court with the same effect as if reprinted expressly for the use of this Court. D. R. means Defendant's Record and C. R. Complainant's Record.

Havell, and Isidor Levy, the former being the maker, and the latter being one of the purchasers of this Lock-box.

Defendants R., Havell, p. 8.
" R., Levy, p. 65.

They are corroborated by all of the defendants' witnesses, and also by one of the *complainant's* own witnesses, Maxwell, Complainant's R., page 81, *et seq.*, who, very much to the surprise of the complainant's solicitors, *does* remember the lock-box.

History and Evidence as to the Havell Lock-Box.

On June 5, 1866, Mr. Havell took out a patent for a bag frame, known as the T frame (D. R., pp. 16, 17), Defendants' Exhibit Havell Patent, 1866, and it was the only one which he took out in that year (D. R., pp. 17, 54). One of these frames has been offered in evidence by the complainant (Complainant's Exhibit Havell Frame). He attached to this frame, at first, a lock like that shown in the drawing of the patent (Carmichael, D. R., pp. 94, 105, Q. 105, *et seq.*, Q. 223), but it did not give satisfaction (Carmichael, D. R., p. 94, Q. 105), and then he adopted a lock like Defendants' Exhibit Havell Lock Box (Carmichael, D. R., p. 94, Q. 105). These last lock-boxes were first put on this frame in 1866 (Havell, D. R., p. 9, Q. 7). They were made by first punching the blanks out of sheet metal, the blanks being then formed in a die. Each end was then clipped separately, the ring-loops were stamped, and the holes for the rivets were punched (Havell, D. R., p. 10, Q. 10). These lock-boxes were like Defendants' Exhibit Havell Lock-Box (Havell, D. R., p. 10, Q. 11). He made quite a number of these lock-boxes in 1866 (D. R., p. 10, Q. 12), and took steps to make a very large number of them (D. R., p. 12, Q. 26) in the same year. He sold these lock-boxes to Levy in

1867, and sent samples to Headley and Edward Simon & Bros. (D. R., p. 13, Q. 32, and p. 39, Q. 225). Mr. Havell's customers, however, complained that the ring-loops on these lock-boxes were so close together that the handle cramped the hand in carrying the bag (D. R., p. 40, Q. 236), and he then cut the ends off of these lock-boxes (D.R., p. 60, Q. 347, 348) and put the handle rings on with separate loops (D. R., p. 24, Q. 119). Mr. Havell, however, thought that he could remedy this defect by making the lock boxes (having the ring-loops in one piece therewith) longer, and he filed out, in 1868, a brass model or pattern of such longer lock-boxes (D. R., p. 11, Q. 20, *et seq.*). This original model or pattern is in evidence, Defendants' Exhibit Havell Brass Model. He never manufactured for the trade any of these longer lock-boxes, however, because he stopped making frames (D. R., p. 12, Q. 25). Havell ceased to manufacture frames altogether in 1868, so that all that he did, is certainly fixed as prior to that date (D. R., p. 12, Q. 25). He produced one of the punches with which the lock-boxes like the Exhibit Havell Lock-Box was made (D. R., p. 12, Q. 28), and it is the only tool which he can find (D. R., p. 49, Q. 290) which has not been changed. It was offered in evidence and marked "Exhibit Havell Punch." The lower die was found, but it has been changed (D. R., p. 64, Q. 375). Mr. Havell, however, on cross-examination describes the tools which were used to form the ring-loops in the lock-box (D. R., p. 48, Q. 282 *et. seq.* and p. 53, Q. 305).

"282 x-Q. What tools did you employ for forming the ring-loops?

"A. A die and a punch.

"283 x-Q. Was that die and punch for forming the ring-loops single or double?

"A. It would only press one end at once.

* * * * * * *

"305 x-Q. Please describe the exact form of punch and die used by you in pressing the ring loops?

" A. The bottom die was made wider than the lock and a place cut in to receive the end of the lock, and then the punch might have been wider than the inside of the lock-box, and then cut away on each side to allow a portion of it to be inside the ring loops and the edge of the lock-box—I couldn't tell how long they were. The front side of the tools extended to about there as near as I can remember (pointing to the end of the lock chamber), and the width of them on the sides and the back I couldn't give—they had to be cut away in the front of the tools, to fit the form that came out of the die."

The defendants have had tools like them made. Exhibit Ring Loop Dies, Nos. 1 and 2.

On cross-examination, complainant's counsel tried to confuse Mr. Havell by the production of *another* lock-box *without* ring-loops attached, being the Complainant's Exhibit Schwerin Iron Lock-Box (D. R., p. 22), and asked him:

" 138 x-Q. Did you make Schwerin Iron 'Lock-Box?'

" A. It looks very much like those that come out of our tools; I can't see why it is not one of ours; we used to polish them, and this one has been polished.

" 139 x-Q. When did you first make things like 'Schwerin Iron Lock-Box?'

" A. In 1866.

" 140 x-Q. And when last?

" A. Well, I coulda't say whether we made them in 1870; I think we made them about three years; I think that was the length and time we made frames; we made lock-boxes for frames the entire length of time that we made the frames; they were not all these kind that we made; there were two kinds.

" 141 x-Q. Did you sell such lock-boxes as 'Exhibit

Schwerin Iron Lock-box ' separate from the frames or attached thereto ?

" A. That lock-box ain't finished ; it has not the holes in the ends ; now we sold lock-boxes on frames like that, and with ring-loops on the frames ; we never sold any off the frames as I know of ; you got that wrong 'with ring-loops on the frames,' I mean ring-loops on the locks."

D. R., p. 27, Q. 138 *et seq.*

In fact this is one of the longer lock-boxes with the loops cut off as was subsequently done (D. R., p. 111, Q. 10).

Mr. Havell accounts for the difference in the shape of the holes in Schwerin Iron Lock-Box from the Havell Lock-Box.

" 166 x-Q. What is the object of the two little round holes in the sides of Exhibit Schwerin Iron Lock-Box ?

" A. I had another movement in this lock-box referred to ; I can remember it now ; I had a different class of movement from the one that is in Exhibit Havell Lock-Box, and that is why these two small holes, the square one and the large round one, are here.

" 167 x-Q. Now, which movement did you get up first ?

"A. The one in Havell Lock-Box ; there never was any of the others made, only that one (referring to Complainant's Exhibit Scherwin Iron Lock-Box."

D. R., 32, Q. 166, 167.

He was asked to quote from the day-book (Defendants' Exhibit Havell Day Book) entries of sales of lock-boxes like Defendants' Exhibit Havell Lock-Box (D. R., p. 41, Q. 244), but he cannot read (p. 29, Q. 145), (D. R., p. 43 ; Q. 247). He says, however, that the entries do not distinguish between frames which

had these locks on and those which had not (D. R., p. 44, Q. 251).

Mr. Havell's account of the Havell Lock-Box is corroborated in every particular by the other witnesses called by the defendant.

Isador Levy testifies that he bought lock-boxes like the Exhibit Havell Lock-Box from Stevens, Roberts & Havell in 1867 (D. R., p. 66), they were attached to frames by rivets, and the rings for the handles were attached to the frame by the lock-box. He bought from fifteen to twenty dozen of different sizes. His customers complained that they cramped the hand (D. R., p. 67), and Mr. Havell told him that he was going to make a longer box (D. R., p. 68). The frame was a T frame (D. R., p. 68). His stock was sold out at auction in 1868, and Mr. Roemer bought some of the articles (D. R., p. 68). The frames were all sold (D. R., p. 69). His cross-examination had no result but to make him fix the date positively, and to give the name of Frederick Meisselback as that of one of the men in his employ who put the bags on these frames. In fact, his testimony is so unshaken that the complainant's counsel made use of a pretext, for which he was himself responsible, to refuse to further cross-examine the witness. This episode, which is fairly illustrative, will be found at page 72 of Defendants' Record.

Frederick Meisselbach testified that he worked for Isidor Levy in 1867 and 1868 (D. R., p. 77), and re-remembers putting about one hundred bags on Robert's and Havell's frames, which had on them lock-boxes like the Defendants' Exhibit Havell Lock-Box.

On cross-examination, he corroborates Havell and Levy in other particulars.

"32 x-Q. You said that Exhibit Havell Lock-Box is the identical lock-box you used; what do you mean by the word identical?

" A. I mean that this is the *same shape* and the *same make up.*

" 33 x-Q. Describe how lock-boxes of that kind appeared when they reached you?

" A. I don't understand exactly the intent of this question.

" 34 x-Q. Never mind the intent, just describe them; state whether they were fastened to anything; if so, to what? Whether they had anything fastened to them; if so, what? Whether they were painted or japanned at the time they reached you?

" A. The locks were, as far as I remember, japanned black; had rings fastened to them for the purpose of fastening the handle to them.

" 35 x-Q. Were they on the frames when you got them?

" A. Yes, sir.

" 36 x-Q. On what frames?

" A. On those Roberts & Havell frames.

" 37 x-Q. Do you know their number—I mean the number of said frames?

" A. No, sir; I had nothing to do with the name of the frames.

" 38 x-Q. How long were the frames?

" A. We used all sizes, from 14 inches up to 20 inches, as far as I can remember.

" 39 x-Q. Did all these sizes from 14 to 20 inches have lock-boxes like Exhibit Havell Lock-Boxes?

" A. Yes, sir; only later times we found that the large frames looked unsightly with a short handle; we had for the larger sizes of bags the rings detached from the lock and put on with a separate fastening.

" 40 x-Q. How did you detach the rings from the locks?

" A. We gave orders that the places where the rings were, should be cut off for the larger sizes, and a separate fastening put on to contain the handles."

Meissellbach further corroborates Ms. Havell's testi-

mony as to the construction of the hasp on the Havell T. frames (D. R., p. 21, Qs. 42–43).

ROBERT CARMICHAEL testified that he worked for Mr. Havell between 1863 and 1881, and remembers using the lock-boxes like Defendants' Exhibit Havell Lock-Box, at Mr. Havell's factory in 1866 (D. R., p. 85).

He was asked:

"7 Q. Do you know what they were made for?

"A. They were made for bag frames.

"8 Q. Were they attached to such bag frames in your shop or not?

"A. They were.

"9 Q. How were they so attached?

"A. Riveted to the frames.

"10 Q. What was placed in the loops such as you see upon that lock-box?

"A. D rings.

"11 Q. What were the rings for?

"A. To fasten handles with.

"12 Q. Please describe the frames to which such lock-boxes were attached?

"A. A piece of sheet metal rolled up in the form of a T, and bent to the shape of the frame."

Again, he was asked:

"15 Q. Please look at the exhibit which I now show you, and which is marked Defendants' Exhibit Havell Punch, and state if you know what that is?

"A. That is the cutting out punch, to cut the blank for the lock-box.

"16 Q. What lock-boxes?

"A. Those (pointing to Exhibit Havell Lock-Box).

"17 Q. When did you first see the Exhibit Havell Punch?

"A. I found the punch in the tools, among a lot of old tools, and gave it to Havell.

"18 Q. When was the first time that you remember ever seeing that punch?

" A. When it was getting made.

" 19 Q. When was that?

" A. Somewhere in the year 1866, I think."

* * * * * *

" 22 Q. Who made that punch?

" A. Bryan Conlan.

" 23 Q. Is that the only tool used for making those lock-boxes that you can now find?

" A. That is the only tool that I know of to make the lock-boxes, but I know of a tool to cut out the name plate.

" 24 Q. What name plate?

" A. That tin plate that is on top of the box (pointing to Defendants' Exhibit Havell Lock-Box).

" 25 Q. Were such name plates attached to the lock-boxes you made in 1866?

" A. Yes.

" 26 Q. Do you know what was done with any of the other tools that were used to make these lock-boxes?

" A. No, not particularly.

" 27 Q. Do you know whether or not any of them were subsequently used for any other purpose?

" A. The side pieces that were used to turn those edges up (pointing to the lock-chamber of Exhibit Havell Lock-Box), they use them for tapers in the shaping machine.

" 28 Q. Have they been altered, or are they still in their original shape?

" A. No; they have been altered."

This corroborates Havell (D. R., p. 64, Q. 375).

The cross-examination of this witness was directed to show that the Exhibit Havell Lock-Box could not have been riveted to a T frame with a central rib, because the exhibit is pierced with three rivet holes at each end, but the fact was that the old lock-boxes had two, four or more holes (D. R., p. 38, Qs. 218, 219; p.

180, Q. 12; p. 226, Q. 80; p. 157, Q. 46), and that the exhibit differs from them in this respect, because, as none of the old boxes could be found, it was made for the purposes of this suit, and, it being an immaterial point, and no specific directions in this regard having been given by Mr. Havell, the exhibit was made with three holes. The witness Schwerin, as we shall see, fully explains how the exhibit was made.

The Exhibit Havell Name Punch and Complainant's Exhibit Havell Frame were produced on the cross-examination of this witness and fully explained by him (D. R., pp. 94 and 104, Q. 97).

An attempt was made to confuse the witness as to where the Havell lock-boxes were made in 1866 (D. R., p. 102, Q. 193), but he explains that Havell had several adjoining buildings for his factory in that year (D. R., pp. 103, 105, Qs. 206, 225).

The Havell lock-boxes were not always made with ring-loops on them, but he does not know why (D. R., p. 106, Q. 237). Some lock-boxes, like the Exhibit Defaced Lock-Boxes, were made by Havell (D. R., p. 106, Q. 240), but subsequently to those like the Exhibit Havell Lock-Box (D. R., p. 107, Q. 242); the defaced lock-box has had the loops cut off, but was formerly like the Exhibit Havell Lock-Box (D. R., p. 106, Q. 239; p. 109, Q. 246).

Carmichael is corroborated in his testimony by Conlan (D. R., p. 154, Q. 30), and by Jenkinson (D. R., p. 221, Q. 36).

Bernard Conlan testifies that he worked for Mr. Havell from 1864 to 1870, and saw lock-boxes like the Defendants' Exhibit Havell Lock-Box while there in 1866 (D. R., p. 150, Q. 8). He further identifies all the tools with which these lock-boxes were made, and which have been offered in evidence by the defendants, as well as the Exhibit Havell Name Punch. He made all the tools for these lock-boxes (D. R., p. 150, Q. 8), and

fully describes the process of making the lock-boxes (D. R., p. 153, Q. 23).

"22 Q. Did you ever see any of those lock-boxes during the process of making?

"A. Yes, sir.

"23 Q. Please enumerate the different steps which were taken in making those lock-boxes, in this order?

"A. We first cut the blank out, next drawing down, next pierce them, different processes; then we set the indentation down to receive the ring; the cutting of the indentation can be done before or after piercing."

This answer is important in view of the admission of the complainant's witness Tolen (C. R., p. 66, Q. 20).

On cross-examination the witness is asked if, in his opinion, the ring-loops on the Exhibit Havell Frame were cut off the ends of lock-boxes like the Exhibit Havell Lock-Box, and he says that he thinks they were not. But there is no evidence in the case that they were. The ends of the lock-boxes were cut off, but they were not used for ring-loops.

The only other point attempted to be made on the cross-examination is an endeavor to make the witness contradict himself, by asking him if he ever made lock-boxes with the ends turned under the ring-loops (D. R., p. 160, Q. 65), and the production of a patent to the witness for such a device. He explains what he means, however, at page 162, Q. 70.

WILLIAM H. NEWTON, the man who Carmichael says attached these lock-boxes to the Havell frames (D. R., p. 101, Q. 187), testified that he was in the employ of Stevens, Roberts & Havell from 1862 to 1871 (D. R., p. 179, Q. 2).

In 1866 he attached to frames like the Complt.'s Exhibit Havell Frame, Lock-Boxes like Defts.' Exhibit Havell Lock-Box (p. 181, Qs. 16–19).

He remembers the witnesses Carmichael, Conlan, and the complainant's witness, Maxwell, and enumerates what positions they held in Havell's employ (p. 180, Q. 21) ; they stopped making frames in 1868 (p. 182, Q. 23).

On cross-examination he states why he remembers the lock-boxes (p. 182, Q. 24 ; p. 187, Q. 57), describes the shape of the rings and says how they were made (p. 183); he also says what, as we have seen above, is probably the fact, that he does not remember the single rivet-hole in the exhibit inside the ring-loop (p. 186, Q. 55).

An attempt is made to show by this witness that the handle-rings had their bearing all across the ring-loops, but it will be seen that the witness distinctly says that they did *not* bear entirely across (p. 184, Q. 37).

ROBERT COHN worked for Isidor Levy from 1866 to 1868 (D. R., p. 196, Q. 40), and saw lock-boxes like the Defts.' Exhibit Havell Lock-Box on frames which he was told came from Stevens, Roberts & Havell, about 1867, (D. R., p. 196, Q. 40). He cut out the bags which Meisselbach put on these frames (D. R., p. 194, Q. 18). The locks were too short for the larger frames (D. R., p. 195, Q. 20–21).

The testimony of this witness is particularly valuable from the fact that the defendants only learned of his knowledge from his having been called as a witness by the complainant's counsel, hoping that he would testify that he had never seen such locks. He, however, had informed counsel that he had seen them, and the complainant did not examine him (D. R., p. 195, Qs. 27, and Q. 72–88).

JOSEPH JOCKEL worked for Nicholas Groel in 1866 or 1867 (D. R., p. 207, Q. 3). He there saw on some of Havell's frames lock-boxes like the Defts.' Exhibit

Havell Lock-Box (p. 208, Q. 13) ; there were rings under the ring-loops (p. 208, Q. 14) ; the frames were japanned black (p. 208, Q. 18). Mr. Groel has been dead for about two years (p. 209, Q. 24).

It is true that on cross-examination this witness is rather confused as to his dates, but he corrects this on his re-direct examination (D. R., p. 215).

GEORGE B. JENKINSON, an unusually intelligent witness, testified that he has been associated with Mr. T. B. Peddie for thirty-two years ; he first saw some of Havell's frames like the Exhibit Havell Frame, as well as he can recollect, about fifteen years prior to November, 1882 (D. R., p. 218, Qs. 8-9) ; they had two kinds of locks on them similar in construction, except that one kind had attachments for the handle-rings, while the other had not (D. R., p. 218, Qs. 11-12) ; they were offered to him for sale (D. R., p. 219, Q. 18). He describes the long lock-box fully before seeing the Exhibit Havell Lock-Box, and on being shown the Exhibit identifies it as like those which he had seen (D. R., p. 220, Q. 30) ; the Exhibit Defaced Lock-Box is like the short lock-boxes that he saw, and has had the ends cut off (D. R., pp. 220-221) ; he objected to the long-boxes because the handle-rings were too close (D. R., p. 218, Q. 11).

The complainant attempted to confuse the witness by asking him if he did not see these lock-boxes on frames like Complainant's Exhibits, Havell Frame, 1867, 1 and 2 (D. R., p. 226), but he says that they were on the T frame ; he was also asked if he had not been sued by Mr. Roemer, and he said that he had not but subsequently explains what he meant (D. R., p. 229-233).

MORRIS SCHWERIN, one of the defendants, saw some of these lock-boxes like the Exhibit Havell Lock-Box in

1872 (D. R., p. 112, Qs. 13–14), but they have been lost (D. R.. p. 113, Q. 17).

It is hardly likely that these ten witnesses, who all confirm and corroborate each other in almost every particular are entirely mistaken, and it is still more improbable that they have all united in an untruth.

Mr. Schwerin gives the history of the lock-box which was offered in evidence and marked Defendants' Exhibit Havell Lock-Box.

As none of the old ones could be found a new one had to be made to be identified by the witness.

Mr. Havell sent to Mr. Schwerin the Exhibit Havell Frame, with the Exhibit Defaced Lock-Box attached (D. R., p. 114, Q. 26); from this Defaced Lock-Box the ring-loops had been cut off (D. R., p. 111, Q. 10); Mr. Schwerin gave this Defaced Lock-Box and the Havell Punch, which he had procured from Mr. Havell, to the foreman of his factory, and told him to make a lock-box in accordance with the instructions which Mr. Schwerin had obtained from Mr. Havell (D. R., p. 114). The foreman, guided also by his own memory of the old lock-boxes (D. R., p. 114, Q. 25), made a blank cut from sheet iron with the Havell Punch, and then stamped it between the Schwerin Top and Bottom Dies into the lock-box marked Exhibit Havell Lock-Box; he put the works which had been contained in the Defaced Lock-Box into the new one and attached to it the name plate taken from the Defaced Lock-box (D. R., Schwerin); the result was a lock-box such as the Defaced Lock-Box had been before the ring-loops had been cut off; Mr. Schwerin then gave instructions to have the Defendants' Exhibit Ring-Loop Dies, Nos, 1 and 2, made in accordance with the testimony of Mr. Havell when on the stand (D. R., p. 128, Q. 101). Mr. Schwerin explains why the lock-box looks as old as it does (D., p. 119, Q. 61).

"61 x-Q. Did you instruct your foreman or any one else to make 'Exhibit Havell Lock-Box' look old?

"A. I did not; the reason why it looks as it does I can easily explain; the name-plate itself is, of course, as old as it was; the box was japanned with air-dry, and that is the reasen why it is all nearly off now; the creases in the box are caused by being dropped into a leaden die instead of steel one, which never brings the work out sharp."

In view of the testimony of Mr. Schwerin that he had had the Exhibit Havell Lock-Box made, and that it was not one of the original locks, the complainant called for the reproduction of the witness Meisselbach and ask him.

"69 x-Q. Did you at the time you testified in this suit know that this Exhibit Havell Lock-Box has been recently made by Mr. Schwerin, and that it is not one of the old Havell Lock-Boxes?

"A. No, sir.

"70 x-Q. When you testified you thought this was one of the old Havell Lock-Boxes, did you not?

"A. The appearance struck me, that I thought it was one of the original locks."

This testimony simply re-enforces his original evidence. The new lock-box is so like the old ones that he thought it was one of the old ones. It had not been necessary to tell him that the exhibit had been newly made in order to ask him if it resembled the original locks, but he was not told that it *was* one of the old locks.

On re-direct he is asked:

"81 Re-d. Q. Did any one ever tell you that the Exhibit Havell Lock-Box was one of the old lock-boxes, made in 1866 by Mr. Havell?

"A. *No, sir.*

"82 Re-d. Q. What change, in your opinion, to the resemblance between the Exhibit Havell Lock-Box and

the lock-boxes made by Mr. Havell, does it make that the Exhibit Havell Lock-box was made recently?

"A. *It does not make any difference* as long as it resembles the original lock used on Havell's frame."

And then he is asked, in view of his present knowledge as to when the exhibit was made:

"83 Re-d. Q. Please describe as far as you can again all the resemblance between the Exhibit Havell Lock-Box and the old lock-boxes used by Havell?

"A. The principal points which I remember best, is the loop that held the ring, the name plate on the top and the bolt with spring."

This is conclusive.

The importance of the bearing of this Havell lock-box on the question of the validity of the Roemer patent is expressly admitted by the complainant's counsel (C. R., p. 24, Q. 6), and is shown by the strenuous efforts which the complainant has made to rebut the positive testimony adduced by the defendants' witness. Such evidence of the complainant, however, must necessarily be of comparatively little value, as it could be of negative character only.

The affirmative statement of a witness as to what he saw and heard is entitled to more credit than the negative statement of another witness, that he did not see or hear the same thing.

Union Sugar Refinery vs. Matthiessen, 2 Fish., 600.

J. T. DORN, a witness for the complainant, testifies on his direct examination, that he worked for Isidor Levy from February, 1867, to January, 1868. He was foreman over the girls who lined the bags (C. R., p. 20, Q. 7); he does not remember the ring loops on the Exhibit Havell Lock-Box, but otherwise the old lock-boxes were like it (C. R., p. 20, Q. 11); he remembers the Exhibit Defaced Lock-Box (p. 21, Q. 11).

It may be reasonably supposed that the witness has some prejudice against Mr. Levy, from his answer to question 6; but independently of this, on cross-examination, he says that the leather bags were made on the floor below him, where Meisselbach worked (C. R., p. 161, Q. 31), and if Meisselbach made some bags out and out, he would not have seen them (Q. 32), (see D. R., p. 77), and he would not have seen the frames unless he had come downstairs (Q. 33); his duties kept him on the upper floor (Q. 34); he remembers the Havell frames (Q. 36), *and Meisselbach might have put leather bags on frames like the Havell frame, having the Havell Lock-Box on them without his seeing them* (Q. 38). He remembers Robert Cohn (Q. 39).

HENRY DRESCHER testifies, on direct examination, that he was Levy's partner in 1867, and had charge of the manufacture of *cloth* bags (D. R., p. 22, Qs. 2, 3). He is then asked:

"5 Q. Look at Defendants' Exhibit Havell Lock-Box and state whether, during the year 1867, in Levy's shop, you remember to have ever seen a lock-box resembling that?

"A. *I don't remember* that I have ever seen a lock like the one shown me now in Levy's shop.

"6 Q. If you had seen such a lock, do you think you would remember having seen it upon looking at the lock shown you?

"A. *I don't remember* that I have ever seen it in Levy's shop" (C. R., p. 22).

That is the best that they can get him to say.

His cross-examination shows that his memory is not good either as to dates or facts:

"39 x-Q. In what month of what year did you enter into partnership with Isidor Levy?

"A. I believe it was January, 1867."

But, after some questioning, he says :

" 46 x-Q. Then you think now, from these facts, that you began to work with Levy in January, 1868, and not January, 1867, do you not ?

" A. I should think so, but I can find out if I look in my papers, home.

" 47 x-Q. But that is your best recollection, is it not ?

" A. I think so " (C. R., pp. 155, 156).

This would make it a year too late for these locks.

Again, he is asked :

" 54 x-Q. Did you see all the bags that went out of Levy's shop ?

" A. *No ; I don't think I saw all* the bags that went out.

" 55 x-Q. Did you see all the bag frames which came to Levy's while you were there ?

" A. *I think not,* because there were so many satchel frames bought where I had no particular occasion to look at them.

" 56 x-Q. While you were with Levy, did he procure any railroad bag frames from Stevens, Roberts & Havell ?

" A. Yes, sir.

" 57 x-Q. Did these frames have the locks on them when they came to Levy's shop ?

" A. They had a top lock.

" 58 x-Q. Do you remember all the kinds of top locks which were on those frames ?

" A. *I only remember one kind ;* it was a gilded top lock with two bolts coming downward, the bolts coming into the other jaw of the frame."

Now, none of the Havell frames in evidence have this kind of a lock, and even Dorn remembered some of these frames (C. R., p. 20, Q. 11).

Again :

" 67 x-Q. Is it not possible that the handle rings may have been fastened to some of the bag frames which you saw in Levy's shop while you were there, by means

of the lock-box itself, and you not remember about it now, at this distance of time?

" A. *Everything is possible.*

" 68 x-Q. Then that is possible, is it not?

" A. If everything is possible, *that is possible, too.*

" 69 x-Q. While you were with Levy did you see all the work that was done by Meisselbach?

" A. I cannot say that I saw every single bag he made."

All that can be said is that the witness has a poor memory.

They asked him on re-direct:

" 77 Re-d. Q. Did you see all the railroad bag frames that came to Levy's while you were there?

" A. *I ain't sure that I saw every one of them.*"

Louis Oswald: The value of the testimony of this witness is to be estimated from the following questions and answers:

" 3 Q. What was your occupation during the year 1867?

" A. I was a bag maker.

" 4 Q. Where were you employed during that year?

" A. In January of 1867 I worked at Simon Brothers; from February to the end of the year I worked with Isidor Levy, in his shop.

" 5 Q. What was your employment in this shop?

" A. I was making bags, cutting patterns, oversee the boys; I was cutting out the leather for satchels; that was about all."

* * * * * *

" 14 Q. Will you describe the way bags were made in Levy's shop, and what frames or kind of frames were used on the bags which Meisselbach worked on while you worked in Levy's shop?

" A. They made different kinds of bags; as satchels, pellisiers, oil cloth bags; the kind Meisselbach did

work on was heavy bags, made out of grain leather and sewed on a hoop iron frame with *inside lock.*

* * * * * *

" 73 x-Q. Satchels are generally smaller than bags, are they not?

" Q. Yes, sir."

No wonder, then, in view of the different classes of work, that the witness further honestly said:

" 44 x-Q. Did you do any work on the bags which Mr. Meisselbach made?

" A. *No.*

" 45 x-Q. Did you do any work on the frames to which he put bags?

" A. *No.*

" 46 x-Q. Do you swear that you saw all the frames to which Meisselbach put bags?

" A. *That's impossible.*

" 47 x-Q. He and his help put bags on the frames which you might not have seen, did they not?

" A. *They might.*"

* * * * * *

" 55 x-Q. His work did not pass through your hands, did it, after he finished it?

" A. *No.*"

The ignorance of this witness in regard to the entire subject is further shown by his answers to questions 48 and 61, in which the matter is not even in dispute; and it is the testimony of such men as these, thus ignorant by their own confession, that is supposed to rebut the evidence of men who saw the lock and worked on the frames!

GOTTHOLD RESLAND is the boy who helped Meisselbach (D. R., p. 83). The defendants did not call Resland because he said he did not remember anything about the Havell Lock-Boxes, as he was too young at the time.

The complainant, however, called him after having

found means to jog his memory. He testifies, on direct-examination, that he was sixteen in 1867 ; that he was in the employ of Isidor Levy and made railroad bags ; he helped Meisselbach, and a few bags were put on the Havell frames in 1867 (C. R., p. 38, Q. 18) ; he *thinks* that he could recognize the locks that he saw in that year ; he did not see the Exhibit Havell Lock-Box, but something similar—" a little higher, I guess " (C. R., p. 36, Q. 10). All that is extracted from this witness on his direct examination is done by very leading questions, and even then his testimony is very indefinite. On cross-examination he forgets everything, as the questions do not prompt him. On the next day, in answer to some more leading questions by complainant's counsel and meanwhile having had his memory refreshed, he is a little more positive and tries to explain. As the points of the new cross-examination, however, could not be foretold, and the witness, therefore, had no prompting, he again breaks down and forgets, and supplies his forgetfulness by *conjecture* (C. R., p. 46, Qs. 85, 86 ; p. 50, Q. 111).

We have not made extracts from the testimony of this witness, because its value can only be estimated from reading it all. The looseness of its character can be appreciated from his saying that some of the frames on which he put bags in 1867 had locks on them like the Defendants' Exhibit Defendants' Lock, and also like another lock *which the complainant's counsel snatched away* before it could be certified to by the Examiner.

This action of the complainant's counsel was very characteristic, but even he could not deny what was the fact that this other lock was one of Mr. Roemer's own patented locks in suit. The whole of this little scene will be found at page 47 of complainant's record.

GOTTFRIED AMES testifies that he worked for Isidor

Levy in 1867, and knew Meisselbach (C. R., p. 58). Then he is asked:

"11 Q. Look at Exhibit Havell Lock-Box and state whether during the year 1867 you saw in Levy's shop a lock-box resembling the one now shown you?

"A. *I could not remember.*

"12 Q. Do you wish to be understood by your last answer as meaning that you do not remember having seen such lock-box in Levy's factory?

Objected to as a misinterpretation and as misleading.

"A. I never seen anything like it before."

On cross-examination he says that he did not work on *railroad bags;* did not examine all the bag frames that came to Levy's shop, nor the locks on them; and *cannot swear* that he saw all the bag frames on which Meisselbach put bags in 1867 (C. R., p. 59, Qs. 15–19).

Of course he cannot swear, and we find that he is wise a little further on. He is asked:

"39 Re-x-Q. You don't remember locks anything like Defendants' Exhibit Havell Lock-Box, do you, as being used in 1867, in Levy's?

"A. The only locks I remember was *side locks* and *box locks.*

"40 Re-x-Q. Is that exhibit either a side lock or a box lock?

"A. No, sir."

Of course not, it is a *top* lock, and so is the Defaced Lock-Box, about which there is no dispute, as both the *complainant's own witnesses* and the defendants' witnesses *agree* that Levy had some of these latter locks which had no loops.

We find what the witness Ames means by side locks and box locks at page 62, Qs. 42–47, and these are all that he remembers. It is unfortunate that he should have forgotten all about locks like the Defaced Lock-Box.

This was the last witness called by the complainant to rebut the testimony of the defendants' witness as to the purchase of these locks by Isidor Levy. We submit that it is wholly insufficient for any such purpose. It is vague, unsatisfactory, contradictory and inconclusive, and is opposed by positive, detailed and unshaken evidence on the part of the defendants.

The complainant also called some witnesses to contradict the defendants' witnesses, Havell, Carmichael, Newton and Conlan, but their testimony is of the same loose and incomplete character as that of the other witnesses whose testimony we have just examined.

Thus WILLIAM TOLEN testified, on direct examination that he had charge of a piercing room at Stevens, Roberts & Havell's factory in 1867, and that he remembered lock-boxes like the Exhibit Havell Lock-Box, with the exception of the ring-loops (C. R., Qs. 64, q. 9, 10). It will be noticed that this is the year *after* the Havell Lock-Boxes were made. He also remembers lock-boxes like the Defaced Lock-Box and the Exhibit Havell Frame (C. R., p. 65), but does not remember how the handles were attached to the frames (p. 65).

On cross-examination, he admits that if these lock-boxes had ring-loops these latter would probably have been stamped in another room after the boxes were pierced (p. 66, Qs. 20, 21). Now, this is just what the witness, Bernard Conlan, says was done (D. R., p. 153, Qs. 23). He also admits that *he may have seen lock-boxes like the Exhibit Havell Lock-Box* (C. R., p. 68, Q. 46). He further identifies all the tools in evidence with which these locks were made, and states what they were used for, and after saying that with a *great deal of trouble* the Defaced Lock-Box might be made out of a blank cut with the Havell Punch (p. 72, Q. 69), he is asked :

81 Re-x-Q. Please compare Defendants' Exhibit Havell Lock-Box with the Defendants' Exhibit Havell

Punch, and state whether you think that that lock-box was made from a blank of the length of the one which that punch would cut out?

A. *Well, to be candid, I think it could;* putting this part in (the shell), making it in that form, you stretch it (C. R., p. 73, Q. 81).

Now, tools are not made in such form that to make with them what is intended to be made you have to use "a great deal of trouble;" nor are they made usually longer than is needed. On the whole, we submit that the testimony of this witness is more valuable to the defendants then to the complainant, and if the defendants had known what the witness knew on the subject they would have called him themselves.

JOHN D. MAXWELL is the complainant's unfortunate witness. Called to prove that he had never seen lock-boxes like the Havell Lock-box, he says that he thinks *he has seen such* a lock-box at Stevens, Roberts & Havell's factory (C. R., p. 82, Q. 4). The rest of his testimony consists of an attempt by complainant's counsel to make him contradict himself, and to threaten him (p. 84, Q. 18).

JOHN F. HACKETT testifies that he worked for Stevens, Roberts & Havell in 1867 (C. R., p. 86, Q. 5), but not in 1866 (Q. 6) the year in which these long lock-boxes were made: he did see, however, lock-boxes like the Defaced Lock-Box in 1867 (p. 86). These were the old lock-boxes with the ring-loops cut off, as was subsequently done, and, of course, the witness saw them.

JOHN J. HACKETT testifies that he worked at riveting in Havell's factory from the latter part of 1866 through 1867, and does not remember seeing lock-boxes like the Exh. Havell's Lock-Box, and neither does he remember the Exh. Havell Frame. Besides having commenced to work *a year too late* for these lock-boxes, on

cross-examination, it transpires, that he did no work on frames of any kind, and is only testifying as to locks which were on frames like the Exh. Havell Frame, 1867, and which he subsequently threw away for scrap-iron in 1870; comment is unnecessary.

JOHN N. KERR was Havell's bookkeeper subsequently to June, 1867, and was not familiar with their stock *until about October*, 1867; he only knew the locks by their numbers, and there might have been locks like the Exh. Havell Lock-Box, without his remembering it (C. R., p. 108, Q. 34); it is apparent, however, that his knowledge relates to a period subsequent to the manufacture of these locks.

JOHN BIRD was also produced by the complainant; instead of being only a witness who does not remember, he is also an unscrupulous witness; his testimony is contradicted by admitted facts, and he does not hesitate to contradict himself; evidence of this will be found (C. R., p. 134, Q. 127; p. 135, Q. 137; p. 136, Q. 143; p. 127, Q. 70). He says he worked on a drop-press at Havell's in 1866 and 1867 (p. 121, Q. 3), and on cross-examination admits that it may have been 1868 (C. R., p. 125, Q. 51); in fact his testimony was given so recklessly and with such strong bias in favor of the complainant, that defendants' counsel found that the best way to lead him was to mislead him as to the importance of the question by its form, and thus elicit the truth (C. R., p. 128, Q. 76; p. 128, Q. 76½, 77½; p. 129, Q. 82); but the whole of his testimony should be read; he remembers what the complainant wants him to remember, and either forgets or makes up the rest.

The complainant also examined a witness, Frederick Sperling, to prove that the No. 3 frames which Havell's Day Book shows were purchased by the firm of Ed. Simon & Bros., did not have the Exh. Havell Lock-

Box on them. Now it will be remembered that Mr. Havell testified that he could not tell whether these lock-boxes were on the No. 2 or No. 3 frames (D. R., p. 29, Q. 146), and it will be observed that the Day Book only shows sales of No. 3 frames to Ed. Simon & Bros. in 1867, *the year after* these lock-boxes were made.

Now, FREDERICK SPERLING testifies that he was familiar with the frames which were purchased by Ed. Simon & Bros., while he was *foreman*, and he was foreman from September 25th, 1866, to May, 1868 (C. R., p. 111, Q. 11), and that during that time he did not see any lock-boxes like the Exh. Havell Lock-Box; he only remembers *one* sample No. 3 frame in 1867, *and they did not use them* (C. R., p. 116, Q. 56), because they were too dear, and this in face of the fact that the Havell Day Book shows sales of *at least eight dozen No. 3 frames* to Ed. Simon & Bros. in 1867.

Now, apart from the fact that there is no claim made, and no proof offered, that these lock-boxes were purchased by Ed. Simon & Bros., and that the defendant Morris Schwerin testifies that he first saw these lock-boxes in 1872 (D. R., p. 112, Q. 14), the witness Sperling remembers some like Exh. Defaced Lock-Box (C. R., p. 113, Q. 20), and also identifies all the Havell frames; on cross-examination he shows conclusively that he knew nothing about the numbers of the Havell frames (C. R., p. 117, Qs. 64–76), and only received one frame like the Exh. Havell Frame (Q. 92).

It is testimony of this kind that we are asked to believe instead of the defendants' witnesses.

The complainant also called Augustus Lehr to rebut the testimony of Joseph Jockel.

It is not necessary to analyze the evidence of this witness. It is sufficiently clear that he is not at all sure about the dates, and the date is an essential element.

He only stayed with Groel eight months after Mr.

Morrow became a partner. (C. R., p. 174, Q. 94) (See, however, Havell's Day Book). He does identify, however, the Havell Frame (C. R., p. 171, Q. 64), and the Exh. Defaced Lock-Box (C. R., p. 172, Q. 72), and *he is not sure* that he saw *all of* Groel's frames (C. R., p. 170, Q. 60).

The complainant also called Joseph Bischoff to rebut the testimony of Mr. Jenkinson. The defendants applied to Mr. Bischoff to procure his testimony, but he did not remember enough to put him on the stand.

His evidence for the complainant, both on direct examination and on cross-examination, shows that he knows nothing, and he speaks English so imperfectly that his testimony is valueless (C. R., p. 177, *et seq*). He is called to contradict the witness Jenkinson, but it is evident from his testimony that he is quite capable of saying one thing at one time, and another thing at another time.

The complainant also examined John O'Neill, Robert Herzog and William Roemer as to certain alleged conversations. Their testimony, which was objected to at the time, besides being wholly incompetent for any purpose whatever, is also immaterial; and in the case of the first two, is hardly what the complainant expected.

He also examined Peter Werle, the Pete Berla of the defendants' witnesses. The only effect of his testimony was to confirm that of the defendant, Morris Schwerin.

We submit that it must be fairly conceded on the whole proofs in the case that the defendants have established the existence of lock-boxes like the Defendants' Exhibit Havell Lock Rox in the year 1866, and its existence being admitted, it remains to be seen how it affects the invention claimed in the Roemer patent in suit.

The defendants' expert, Mr. Du Faur, testifies upon

the subject of the Havell Lock-Box and its bearing on the patent in suit at page 171 of Defendants' Record.

He testifies that the Havell Lock-Box has notched sides in the box, which form hook-shaped ends to hold down the handle rings of the bag, and that these notches leave the handle rings free to vibrate, and is so far identical with the Roemer Lock.

It is instructive now to see how the complainant's own expert, Mr. Drake, meets the Havell Lock-Box. His evidence will be found at page 141 of Complainant's Record.

Without passing upon the infinitesimal differences which he finds between the two devices, or remarking upon the contradiction to his answer to question 17 contained in his answer to the very leading question 19, it is worth while to turn to his cross-examination at pages 151–152. It is here found that the witness, when pressed, is too honest to say that the Havell Lock-Box is not the substantial equivalent of the Roemer Lock. And that it did not require invention to make the Roemer Lock in view of the Havell Lock-box, which it is quite possible that Mr. Roemer saw (D. R., p. 68, Q. 27), is testified to by Du Faur (D. R., p. 178, Q. 42).

The complainant is so well aware that the Havell Lock-Box is fatal to his patent, that he was driven to the feeble expedient, at page 13 of Defendants' Record, of noticing a motion to strike out the amendment to defendants' answer containing the defense of the Havell Lock, and to repeat his notice at page 40.

The defendant Schwerin, both in his affidavit and in his evidence (D. R., p. 113), sufficiently explains the fact.

The Fisher Bag Lock.

This original bag and lock were imported into this country in March, 1877. As this was prior to the date even of Roemer's *first* patent, of May, 1877, it must be

taken to be earlier than any invention of the subject matter of the patent in suit.

The circumstances and date of the importation of this bag, which is in evidence and marked "Defts. Exhibit Fisher Bag," are detailed by the witness Bernheim (D. R., p. 267). He is corroborated by two English Certificates of Registration of Design for a bag lock, dated respectively, August, 1875, and February 5, 1876. These certificates were offered in evidence (D. R., pp. 263, 264), with the drawings attached thereto, and illustrate the form of bag lock shown on the Fisher bag. The certificates with annexed drawings will be found at the end of Defendant's Record.

The complainant's cross-examination was directed merely to show that the existence of this bag was known to the defendants at the time the original answer was filed, but it failed to do so.

The date of the importation is thus not disputed.

The defendants examined an expert as to the similarity between this Fisher bag lock and the Roemer lock.

After testifying that the drawing attached to the Certificate of Registration filed by Samuel Fisher for a Design, dated August, 1875, correctly illustrates the Fisher bag lock, D. R., p. 298, Q. 6, Mr. Hyde says, and his quotations are taken from the specification of the Roemer patent:

"In comparing the lock shown in the Exhibit "Fisher Bag, with the device exhibited in the Roemer "Patent 195,233, it may be said that the Roemer "specification quite accurately describes Mr. Fisher's "lock, with the exception that Mr. Roemer places his "locking mechanism above the frame of the bag instead "of below it, as in the case of the Fisher bag, and "therefore makes his lock case high enough to enclose "such locking mechanism.

"Both Mr. Roemer's lock case and the Fisher lock "case exhibit a 'construction of lock case for traveling

" bags, satchels and the like, whereby the same is made " to retain the rings which connect with the handle, to " dispense with an extended bottom plate, and yet to " have said rings movable in their bearings.' Both Mr. " Roemer's device and the Fisher lock case have " 'notches in the sides near the end of the lock case— " which notches engage ever the lower parts of the " handle rings.' In both devices the rings are free to " vibrate in these hooks, 'and free therefore to move " with the handles, and the rings constitute, in conse- " quence, a flexible connection between the handle and " the bag or satchel.' In both of the devices the " notches are so made in the sides that the top of the " lock case offers no obstruction to the free movement " of handle and rings. The Fisher device is fully de- " scribed also in the claim of the said Roemer patent, " so that not only is the likeness between the Fisher " device and the Roemer device a functional one, but " one of form and structure also, with the exception " that I pointed out in the first part of my answer " (D. R., p. 279).

On the question whether that difference involved invention, in view of the Fisher bag and the Simon Patent No. 177,020, Mr. Hyde says :

" Now, taking the Simon Patent No. 177,020, and " Exhibit Fisher Bag, into considertaion *alone*, I am of " the opinion that it required no invention to make " the device described and claimed in the Roemer " Patent No. 195,233, for the reason that Mr. Roemer " has simply taken an old form of lock, such as is " shown in the said Simon Patent, namely, one acting " on top of the frame of the bag, and placed it in an old " form of lock case, such as is exhibited in the Fisher " Bag, and such substitution could not in my opinion " be called invention " (D. R., p. 280).

Mr. Hyde's cross-examination was an endeavor to show that the sides of the Fisher Bag lock were not notched out, as in the Roemer lock, and that the lock

was not, therefore, the same. But apart from the fact that such a simple difference of form, even if it did exist, would not require invention, as testified to by the defendants' expert, Du Faur, in the case of the Havell lock, it will be seen that Mr. Hyde distinctly says that the sides of the Fisher lock *are* notched, and that the Complainant's Exhibit Bernheim Fisher Lock differs from the drawing, in his opinion, in that respect (D. R., p. 284).

As the complainant took no testimony whatever on the subject of the Fisher lock, although its resemblance to the Roemer lock is apparent at a single glance, it must be presumed that he could not find any one to swear that it was not substantially the same thing, and, therefore, anticipation by it is clearly established.